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IN THE

Supreme Court of the United States

October Term, 1969

No. .....

DANIEL ROWAN, doing business as AMERICAN BOOK SERVICE, DONALD BARRSUGLIA, doing business as CAL-SUR CO., CHRIS WARFIELD, doing business as HOME PRODUCTS, RONALD STUART, doing business as RAS ENTERPRISES—DARO INDUSTRIES, PETE CHRISTO, doing business as ATHENA PRODUCTS, SOL RESNICK, doing business as CAMEO DISTRIBUTORS, WILLIAM YOUNG, doing business as BILTHELS MAILING SERVICE, FLOYD CLEMENS, doing business as TIFFANY ENTERPRISES, LEJAY WINKLER, doing business as QUALITY PRODUCTS, KEVIN CURLEY, doing business as MEDIA CONSULTANTS, LAMBERT FONTENOT, doing business as UNITED SURGICAL, RALPH LEVERSON, doing business as PREMIER PRODUCTS, NORMAN ARNO, doing business as NORMAN STACY & ASSOCIATES, NORMAN ARNO, doing business as C & A SALES, and EVE MILLER,

Appellants,

vs.

UNITED STATES POST OFFICE DEPARTMENT, UNITED STATES POSTMASTER GENERAL W. MARVIN WATSON; ATTORNEY GENERAL OF UNITED STATES, RAMSEY CLARK,

Respondents.

JURISDICTIONAL STATEMENT.

A. Memorandum of Decisions.

Appended hereto is the Memorandum of Decision of Judges Charles H. Carr and Manuel L. Real, United States District Judges, and specially concurring Memorandum Opinion of Shirley M. Hufstedler, Circuit Judge.

B. The Jurisdiction of This Court Is Invoked Upon the Following Grounds.

1. The proceedings herein originate upon a Complaint and Petition for Declaratory Relief to declare Title 39, U.S. Code Section 4009 unconstitutional in that said statute is in violation of the United States Constitution, Article I, Section 8, and the First Amendment and the Fifth Amendment thereto. The Complaint and Petition also sought a temporary restraining order, preliminary injunction and permanent injunction against the enforcement, implementation and administration of said statute by the United States Post Office Department, United States Postmaster General, and Attorney General of the United States.

Upon application duly made, a three Judge Court was convened pursuant to Title 28, U.S.C. 2282 and 2284.

Both written and oral argument were submitted to said three Judge Court on November 4, 1968. On April 30, 1969, said three Judge Court denied the granting of an interlocutory injunction and moreover, dismissed the within action pursuant to Rules 56 and 12(b) of the Federal Rules of Civil Procedure.

This appeal is brought pursuant to Title 28 U.S.C. Sections 1253, 2282 and 2284. Further, this appeal not only falls within the purview of Title 28 U.S.C. Section 1253, but further purports to be a final determination of all the issues presented to said three Judge Court by virtue of the dismissal of the action pursuant to Rules 56 and 12(b) of the Federal Rules of Civil Procedure.

2. The date of the ruling and judgment in the above named matter was April 30, 1969, and the date of

entry of said decision and judgment was April 30, 1969.

The date of the Notice of Appeal filed herein was May 28, 1969. The Notice of Appeal was filed in the United States District Court for the Central District of California. No rehearing date was requested nor granted.

3. The statutory provisions believed to confer jurisdiction on this Court of the appeal herein is Title 28 U.S.C. Section 1253. In addition, inherent to the foregoing statutory provision conferring jurisdiction on this Court of the appeal is Title 28, U.S.C. Sections 2282 and 2284.

4. The cases believed to sustain the jurisdiction of this Court over this matter are as follows:

Dombrowski v. Phister, 85 S. Ct. 1942; 380 U.S. 479 (1965);

Flast v. Cohen, 88 S. Ct. 1942; 392 U.S. 83 (1968);

Keyishian v. Board of Regents of the University of the State of New York, 87 S. Ct. 675, 385 U.S. 589 (1967);

Morgan v. Katzenbach, 86 S. Ct. 1717, 384 U.S. 641 (1966);

Radio Corporation of America v. U.S., 71 S. Ct. 806, 341 U.S. 412;

Zemel v. Rusk, 85 S. Ct. 1271, 381 U.S. 1 (1964).

The text of the United States Statute involved herein is as follows:

EXHIBIT "A"

PUBLIC LAW 90-306

December 16, 1967

§ *4009. Prohibition of pandering advertisements in the mails*

"(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postmaster General to refrain from further mailings of such materials to designated addresses thereof.

"(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postmaster General shall issue an order, if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees.

"(c) The order of the Postmaster General shall expressly prohibit the sender and his agents or assigns from making any further mailings to the designated addressees, effective on the thirtieth calendar day after receipt of the order. The order of the Postmaster General shall also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all

mailing lists owned or controlled by the sender or his agents or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

"(d) Whenever the Postmaster General believes that the sender or anyone acting on his behalf has violated or is violating the order given under this section, he shall serve upon the sender, by registered or certified mail, a complaint stating the reasons for his belief and request that any response thereto be filed in writing with the Postmaster General within fifteen days after the date of such service. If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a district court of the United States for an order directing compliance with such notice.

"(e) Any district court of the United States within the jurisdiction of which any mail matter shall have been sent or received in violation of the order provided for by this section shall have jurisdiction, upon application by the Attorney General, to issue an order commanding compliance with such notice. Failure to observe such order may be punished by the court as contempt thereof.

"(f) Receipt of mail matter thirty days or more after the effective date of the order provided for by

this section shall create a rebuttable presumption that such mail was sent after such effective date.

"(g) Upon request of any addressee, the order of the Postmaster General shall include the names of any of his minor children who have not attained their nineteenth birthday, and who reside with the addressee.

"(h) The provisions of subchapter II of chapter 5 (relating to administrative procedure) and chapter 7 (relating to judicial review) of part I of title 5, United States Code, shall not apply to any provisions of this section.

"(i) For the purposes of this section—

"(1) mail matter, directed to a specific address covered in the order of the Postmaster General, without designation of a specific addressee thereon, shall be considered as addressed to the person named in the Postmaster General's order; and

"(2) the term 'children' includes natural children, stepchildren, adopted children, and children who are wards of or in custody of the addressee or who are living with such addressee in a regular parent-child relationship."

(b) The table of contents of chapter 51 of title 39, United States Code, is amended by adding at the end thereof—

"4009. Prohibition of pandering advertisements in the mails.".

Sec. 302. The provisions of this title shall become effective on the one hundred and twentieth day after the date of enactment of this Act.

Effective Date: 4-15-68.

C. The Questions Presented by the Appeal.

1. Is *Title 39 U.S.C. 4009* unconstitutional?

2. Does *Section 301 of Public Law 90-206 (39 U.S.C. Section 4009)* violate the First Amendment of the Constitution of the United States as an abridgement of plaintiffs' right of free speech and freedom of the press?

3. Does *Section 301 of Public Law 90-206 (39 U.S.C. Section 4009)* violate the Fifth Amendment of the Constitution of the United States, in that it denies plaintiffs due process of law?

4. Does *Section 301 of Public Law 90-206 (39 U.S.C. Section 4009)* violate the Constitution of the United States in that said statute is vague, ambiguous, standardless, and as applied to plaintiffs, an unlawful delegation of power?

5. Do the procedures available to plaintiffs in connection with hearings provided for pursuant to *Section 301 of Public Law 90-206 (39 U.S.C. Section 4009)* violate the Fifth Amendment of the Constitution of the United States in that it denies plaintiffs due process of law?

6. Are plaintiffs entitled to injunctive relief enjoining the execution, implementation and administration of *Section 301 of Public Law 90-206 (39 U.S.C. Section 4009)*?

7. Is the denial of injunctive relief to plaintiffs herein an abuse of discretion?

8. Are the Findings of Fact supported by the evidence herein?

9. Are the Conclusions of Law supported by the facts?

10. Inherent in Numbers 8 and 9 herein is the question whether the Appellants' action herein was properly dismissed pursuant to Rule 56 and 12(b) of the *Federal Rules of Procedure.*

11. Are the rules of practice appended hereto (39 C.F.R. 956) in proceedings relative to violations under Title 39 U.S.C. 4009 unconstitutional in that they violate the Fifth Amendment of the Constitution of the United States?

D. Statement of Case.

Appellants herein are publishers, distributors, owners and operators of mail order order houses, list brokers, owners and operators of mail service organizations and purveyors of items and books through the mail. *Section 301 of Public Law 90-206 (Title 39 U.S.C. Section 4009)* was enacted and became effective on April 15, 1968. Immediately thereafter appellants herein received collectively between 7,000 and 10,000 Prohibitory Orders. This is substantiated by the Affidavits filed in support of the action originated in the Court below and in support of the Application for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction. These Affidavits were uncontroverted. Appellants were threatened by a like number of administrative hearings and appellants were further threatened with eventual prosecution for contempt upon each complaint. Appellants originated an action upon a complaint and petition for declaratory relief to declare *Title 39 U.S.C. Section 4009* unconstitutional in that it is violative of the United States Constitution and namely,

Article I, Section 8, the First Amendment and Fifth Amendment thereto. Appellants moreover asserted that said law was an unlawful delegation of power, was ambiguous and standardless, all in derogation of the Constitution of the United States.

Written presentation and oral argument having been held on November 4, 1968 before a three Judge Court resulted in a denial for the application of preliminary injunction and resulted in a dismissal of appellants' complaint pursuant to Rules 56 and 12(b) of the Federal Rules of Civil Procedure.

E. The Questions Presented Herein Are Substantial.

The questions presented in this matter are substantial and require plenary consideration with briefs on the merits and oral argument for their ultimate resolution. The issues raised in this case and on this appeal involve a Federal Statute never before reviewed by this Court. The issues in question are matters of first impression and involve fundamental Constitutional guarantees and rights. The issue of whether appellants' rights as granted pursuant to the First Amendment of the Constitution guaranteeing free speech and freedom of press are called into question. Appellants' rights under the Fifth Amendment of the Constitution of the United States are raised in this matter also. The statute in its attempt is far reaching in its scope so as to have a chilling effect upon constitutional guarantees and rights, including but not limited to the First Amendment of the Constitution and Fifth Amendment of the Constitution of the United States.

F. The District Court Abused Its Discretion.

The United States District Court of the Central District of California abused its discretion in denying the Application for an Interlocutory Injunction in that *Title 39 U.S.C. Section 4009* is unconstitutional in one or more of the various aspects designated by appellants herein and hence to permit same to be enforced and applied to appellants herein is in derogation of the Constitution of the United States. Moreover, the dismissal of appellants action below pursuant to Rules 56 and 12-(b) of the Federal Rules of Civil Procedure leaves appellants with no other course but than to involve themselves in a multiplicity of litigation upon a narrow piecemeal basis that is destructive.

No contrary showing was made in opposition to appellants' contentions in their Affidavits in support of their action in the U.S. District Court below, and hence the actual assertions made therein by appellants must be deemed uncontroverted. The danger of irreparable harm and lack of remedy at law is clear from these uncontroverted factual assertions.

Not only does *Title 39 U.S.C. Section 4009* vest broad and chilling powers in individuals, it further provides that the government of the United States by and through the Postmaster General order appellants herein their agents or assigns to delete immediately the names of certain designated addresses from all mailing lists owned or controlled by appellants or their agents or assigns, and further that appellants and their agents or assigns are prohibited from the sale, rental, exchange or other transaction involving mailing lists bearing the names of complaining addressees pursuant to said statute. All of this is in derogation of the Constitu-

tion of the United States, including but not limited to the First Amendment and Fifth Amendment thereof.

Both appellants and respondents in the Court below agreed upon the interpretation and scope of the statute brought in question by the action and the Court did disagree with same and interpreted said statute not consistent with the evidence or facts. The facts are not supported by the evidence and the conclusions of law are not supported by the facts. A denial of the Interlocutory Injunction predicated upon the foregoing constitutes an abuse of discretion.

G. Judgment.

United States District Court, Central District of California.

Daniel Rowan, *et al.*, Plaintiffs, v. United States Post Office Department, *et al.*, Defendants. Civil No. 68-1562-R.

This action came on for hearing before the specially convened three-judge court, the Honorable Shirley M. Hufstedler, United States Circuit Judge, the Honorables Charles H. Carr and Manuel L. Real, United States District Judges, presiding, and the issues have been duly heard and the decision have been duly rendered,

It Is Ordered and Adjudged that the plaintiffs take nothing and that this action be dismissed on the merits, effective *nunc pro tunc* as of April 30, 1969.

Dated: This 18th day of June, 1969.

John A. Childress
Clerk, U .S. District Court

Approved as to form by: Joseph Taback, Attorney at Law, Attorney for Plaintiffs.

Presented by: Larry L. Dier, Assistant U. S. Attorney, Attorney for Defendants.

Respectfully submitted,

JOSEPH TABACK,
GOLD, HERSCHER & TABACK,
Attorneys for Appellants.

APPENDIX "A".

Memorandum of Decision.

United States District Court, Central District of California.

Daniel Rowan, doing business as American Book Service, Donald Barrsuglia, doing business as Cal-Sur Co., Chris Warfield, doing business as Home Products, Ronald Stuart, doing business as Ras Enterprises-Daro Industries, Pete Christo, doing business as Athena Products, Sol Resnick, doing business as Cameo Distributors, William Young, doing business as Bilthels Mailing Service, Floyd Clemens, doing business as Tiffany Enterprises, Lejay Winkler, doing business as Quality Products, Kevin Curley, doing business as Media Consultants, Lambert Fontenot, doing business as United Surgical, Ralph Leverson, doing business as Premier Products, Norman Arno, doing business as Norman Stacy & Associates, Norman Arno, doing business as C & A Sales, and Eve Miller, Plaintiffs, v. United States Post Office Department; United States Postmaster General, W. Marvin Watson; Attorney General of United States, Ramsey Clark, Defendants. No. 68-1562-R

Filed: April 30, 1969.

Plaintiffs herein are all either engaged in the mail order business, distributing, mailing and selling items, books and materials through the United States mail, or in the business of buying and selling lists of names to mail order houses or both.

Each of the plaintiffs have received prohibitory orders issued by the Postmaster General pursuant to the pro-

visions of Public Law 90-206, now codified as Title 39 U.S.C. § 4009.[1]

A three-judge court convened pursuant to 28 U.S.C. § 2284 now considers the attacks of plaintiffs upon the alleged constitutional deficiencies of Title 39 U.S.C § 4009 as applied to their mail order business. Plaintiffs complain that section 4009 is unconstitutional because:

1. It is particularly violative of free speech granted by the First Amendment of the Constitution,

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[1]Title 39 Section 4009 provides:

§4009. Prohibition of pandering advertisements in the mails

"(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postmaster General to refrain from further mailings of such materials to designated addresses thereof.

"(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postmaster General shall issue an order, if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees.

"(c) The order of the Postmaster General shall expressly prohibit the sender and his agents or assigns from making any further mailings to the designated addressees, effective on the thirtieth calendar day after receipt of the order. The order of the Postmaster General shall also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

"(d) Whenever the Postmaster General believes that the sender or anyone acting on his behalf has violated or is violating the order given under this section, he shall serve upon the sender, by registered or certified mail, a complaint stating the reasons for his belief and request that any response thereto be filed in writing with the Postmaster General within fifteen days after the

2. It is violative of due process guaranteed by the Fifth Amendment of the Constitution of the United States,

3. It is vague, ambiguous, uncertain and without standards,

4. It provides an unlawful delegation of powers, and asks that defendants be temporarily restrained and

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date of such service. If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a district court of the United States for an order directing compliance with such notice.

"(e) Any district court of the United States within the jurisdiction of which any mail matter shall have been sent or received in violation of the order provided for by this section shall have jurisdiction, upon application by the Attorney General, to issue an order commanding compliance with such notice. Failure to observe such order may be punished by the court as contempt thereof.

"(f) Receipt of mail matter thirty days or more after the effective date of the order provided for by this section shall create a rebuttable presumption that such mail was sent after such effective date.

"(g) Upon request of any addressee, the order of the Postmaster General shall include the names of any of his minor children who have not attained their nineteenth birthday, and who reside with the addressee.

"(h) The provisions of subchapter II of chapter 5 (relating to administrative procedure) and chapter 7 (relating to judicial review) of part I of Title 5, United States Code, shall not apply to any provisions of this section.

"(i) For the purposes of this section—

"(1) mail matter, directed to a specific address covered in the order of the Postmaster General, without designation of a specific addressee thereon, shall be considered as addressed to the person named in the Postmaster General's order; and

"(2) the term 'children' includes natural children, stepchildren, adopted children, and children who are wards of or in custody of the addressee or who are living with such addressee in a regular parent-child relationship."

permanently enjoined from enforcing, implementing, acting upon or demanding performance pursuant to section 4009 of the United States Code, or any administrative determinations or order predicated thereon and that section 4009 be declared null and void.

The matter now comes before the Court upon motion for preliminary injunction on behalf of plaintiffs and defendants' motion to dismiss pursuant to Rule 12(b) Federal Rules of Civil Procedure.[2]

I.
THE FIRST AMENDMENT AND PLAINTIFFS' COMPLAINTS

Use of the mails for the dissemination and distribution of protected materials,[3] particularly written materials, is well within the protection and guarantee of the First Amendment of the United States Constitution.[4] But plaintiff does not here present a *per se*

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[2]Federal Rules of Civil Procedure, Rule 12(b) provides in pertinent part:

"Rule 12. Defenses and Objections—
When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings.

* * *

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto . . . except the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted, . . ."

[3]Reference to "protected material" includes all matter other than those declared expressly non-mailable by statute or regulation withstanding the test of constitutional validity.

[4]*Milwaukee Publishing Co. v. Burleson*, 255 U.S. 407, 437 where Mr. Justice Holmes says:

". . . The United States may give up the Post Office when it sees fit, but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our own tongues. . . ."

See also *Speiser v. Randall*, 357 U.S. 513, 518.

prohibition of a use of the mails. Execution of any prohibitory order requires:

1. The *addressee* in his sole discretion believes a pandering advertisement to be erotically arousing or sexually provocative, and,

2. *Notice* to the Postmaster General by the addressee and *request* by the addressee of issuance of a prohibitory order.

These provisions make it clear that we must balance free speech when it confronts an unwilling recipient's right of privacy—pre-dating constitutional considerations and constitutionally recognized in *Raines v. United States,* 362 U.S. 17; *Breard v. Alexandria,* 341 U.S. 622 and *Griswold v. Connecticut,* 381 U.S. 479.

In *Breard v. Alexandria, supra,* a municipal ordinance forbidding peddlers and canvassers from going to private residences without an invitation was upheld. The Court in considering the First Amendment claims of magazine vendors says at page 637:

> "We recognize the importance to publishers . . . of house-to-house method of selling by solicitation. As a matter of Constitutional law, however, they in their business operations are in no different position so far as the Commerce Clause is concerned than the sellers of other wares. Appellant . . . , is no more free to violate local regulations to protect privacy than are other solicitors."

Plaintiffs maintain that in balancing the guarantee of First Amendment to freedom of speech and of the press and the right of privacy that the right of privacy must yield, citing to us the decision in *Lamont v. Com-*

missioner Of Motor Vehicles, 269 F. Supp. 880 (S.D. N.Y. 1967).

We disagree—particularly in the posture of what is proscribed by the statute here in question. Judge Frankel had before him the enjoining of a sale of lists which (1) were public records, (2) may have contained names of willing as well as unwilling recipients, and (3) were prior restraints. Here we are concerned with a statute that proscribes mailings to an *unwilling* recipient *only.* To require a commercial enterprise to strike a name from a mailing list seems little burden to impose to guarantee that dimension of privacy to an individual, otherwise helpless in his home, to "turn off" pandering advertisements which may be erotically arousing or sexually provocative to him and his family.

We accept the suggestion of validity of such a statute as pronounced by the Supreme Court in referring to 39 C.F.R. § 44.1(a)[5] in *Lamont v. Postmaster General,* 381 U.S. 301, when it says at page 310:

> "The government asserts that Congress enacted the statute in the awareness that Communist political propaganda mailed to addressees in the United States on behalf of foreign governments was often offensive to the recipients and constituted a sub-

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[5]39 C.F.R. § 44.1(a) (now § 154.1) provides in pertinent part:

§ 154.1 Delivery to persons.

"(a) Delivery to addressee. The addressee may control delivery of his mail. In the absence of a contrary order, the mail is delivered as addressed. . . . The addressee may refuse to accept a piece of mail at the time it is offered for delivery. Also, he may request his postmaster in writing to withhold from delivery for a period not to exceed 2 years specifically described items of foreign printed matter or any obscene, lewd, lascivious, or indecent matter. . . ."

sidy to the very governments which bar the dissemination of publications from the United States. But the sensibilities of the unwilling recipient are fully safeguarded by 39 C.F.R. § 44.1(a) (Supp. 1965) under which the Post Office will honor his request to stop delivery; . . . ."

Title 39 U.S.C. § 4009 is only an implementation of the right of an individual to choose what it is he desires to see and read within his own personal sensitivity and concept of privacy.

It is summed up in *Kovacs v. Cooper,* 336 U.S. 77 at page 88—

". . . The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself. . . ."

II.
DUE PROCESS AND PLAINTIFFS' COMPLAINT

The due process argument of plaintiff has been two-fold—(1) procedural defects and (2) confiscatory aspect of prohibitions on mailing lists.

1. A request from an addressee to the Postmaster General,

2. Issuance of an order by the Postmaster General ordering the sender to refrain from further mailings to a named addressee and deletion of the name of the named addressee from mailing lists,

and without penalty of any kind for violation of the order of the Postmaster General. Upon violation of the prohibitory order:

3. The Postmaster General must serve by registered or certified mail a complaint stating the violation,

4. The sender has 15 days within which to respond to the complaint,

5. If requested by the sender—a hearing to determine whether or not a violation has occurred,

the Postmaster General is still not authorized to prohibit the delivery of *any* mail even though it may be violative of the order. Effective enforcement can only be had:

6. After request to and action by the Attorney General in petitioning to a United States district court for an order of compliance with the notice.

A violation of the order of the district court may be punished as contempt. A recitation of the procedure makes it abundantly clear that section 4009 comports to the Constitutional requirements of due process.

Confiscatory Aspects:

Plaintiff complains that section 4009 in permitting the Postmaster General to order deletion of the name of an addressee from a mailing list is unduly oppressive and amounts to a violation of due process. Plaintiffs argue that their lists are not alphabetical and therefore the cost of deletion is approximately $5.00 per name. This estimated cost, without more, appears incredible. But, assuming that plaintiffs have accurately assessed the cost of eliminating a name from a list, such a burden does not amount to a violation of due process

guaranteed by the Fifth Amendment of the Constitution. Particularly when in the context presently before this Court it is being applied to commercial enterprises.

We do not read this statute to require that a sender refrain from *any* future mailings but only from mailings of "such materials," i.e., "any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative." Nor do we read the statute to prevent "sale, rental, exchange or other transaction" of a mailing list from which the name of a complaining addressee has been deleted. Plaintiffs' contentions to the contrary are without merit.

III.

VAGUENESS, AMBIGUITY, STANDARD AND UNLAWFUL DELEGATION OF POWER

Plaintiff charges generally vagueness, ambiguity, lack of standard and unlawful delegation of power. It should be noted at the outset that no effective or threatened *prohibition* of free use of the mails is effected until hearing and order of an appropriate United States district court.

The standard could hardly be clearer than provided here. For the statute provides that the sender can be ordred to refrain from mailing "erotically arousing or sexually provocative" materials, *as determined by the addressee*, requesting issuance of an order of the Postmaster General. It is after the *first mailing* that all other proposed mailings are to be measured by the objectionable material of such first mailing.

It is only after determination of a United States district court *upon trial* and order that a sender is in

danger of any penalty for mailings subsequent to the order of an appropriate United States district court but not of any order issued by the Postmaster General.

That the addressee may initiate the process, in which eventually the Attorney General "is authorized to make application, to a district court of the United States, for an order directing compliance with such notice," as part of a comprehensive scheme to guarantee to both parties, addressee and sender, a hearing before the district court of their respective rights and duties, comports with all notions of fairness and due process expressed in the Constitution. The discretion given the addressee affects only the individual asserting his and his minor children's right of privacy. It sets no standard to be applied to anyone else or to the community at large. It does not infringe the right of any individual to accept or reject ideas in the marketplace of free expression. We find no unlawful delegation of power in validating this statute.

IV.
PRELIMINARY INJUNCTION AND THE MOTION TO DISMISS

Where injunctive relief is sought, plaintiffs must show that there is a reasonable probability that they will prevail on the merits; that the danger of irreparable damage is immediate; and that they have no adequate remedy at law.

Plaintiffs fail in each respect. The statute provides a specific remedy at law *before* plaintiffs can be compelled to do anything. We see no reason that injunctive relief should be granted.

Since no factual issue is in dispute; having determined that Title 39 U.S.C. § 4009 is constitutional and provides an adequate forum in which plaintiffs may litigate any dispute they may have with any of the defendants herein, the motion to dismiss, treated as one for summary judgment under Rule 56, as required by Federal Rules of Civil Procedure Rule 12(b), is granted.

Pursuant to Rule 52 of the Federal Rules of Civil Procedure, this opinion shall constitute the findings of fact and conclusions of law.

The Clerk is instructed to enter judgment for defendants.

DATED: April 30, 1969.

/s/ CHARLES H. CARR
Charles H. Carr
United States District Judge

/s/ MANUEL L. REAL
Manuel L. Real
United States District Judge

Concurring by separate opinion. Shirley M. Hufstedler, United States Circuit Judge.

APPENDIX "B".

Specially Concurring Memorandum Opinion.

United States District Court, Central District of California.

Daniel Rowan, dba American Book Service, et al., Plaintiffs, v. United States Post Office Department, et al., Defendants. No. 68-1562-R.

Before:—HUFSTEDLER, Circuit Judge, and CARR and REAL, District Judges.

HUFSTEDLER, Circuit Judge:

Although I agree that section 4009 can be sustained constitutionally, I cannot accept the reasoning of the majority opinion. In my view the statute can be salvaged by meticulously construing its provisions to shrink its loosely woven fabric to constitutional size and by applying to the statute, as thus construed, settled constitutional doctrine. It cannot be saved by submerging the First Amendment problems, as does the majority opinion, by invoking an amorphous concept of the right of privacy.

Congress enacted section 4009 in response to vocal public demand that something be done to check the flow of advertisements for erotic publications that were mailed to unwilling addressees.[1] In drafting section 4009, Congress was fully aware that it was legislating in an atmosphere permeated with the imperatives of the First Amendment as well as one charged with the emo-

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[1]"Hundreds of thousands of complaints are received annually by the Post Office Department and individual members of Congress about the repeated receipt of unsolicited mail which is obscene, obnoxious, or otherwise offensive to the recipient." Senate Report No. 801, *U.S. Code Cong. & Admin. News* 2258, 2294, 90th Cong., 1st Sess. (1967).

tional voltage generated by the subject of pornography.[2] The targets of section 4009 are the commercial purveyors of pornography. Because criminal penalties for sending obscene matter through the mails have been largely ineffective in controlling the stream of printed sludge coursing through the mails, Congress devised the nonpenal regulatory scheme found in section 4009, whereby addressees can set in motion prohibitory orders to prevent senders of such material from mailing further offending matter to them.

The congressional aim is stated in the first paragraph of section 4009:

> "(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postmaster General to refrain from further mailings of such materials to designated addressees thereof."

The remaining provisions of the statute establish the procedure to enforce the quoted paragraph. Subsection (b) authorizes the Postmaster General, on request of the addressee, to issue an order directing the sender "to refrain from further mailings to the named addressees"; subsection (c) says that the order shall direct the sender "to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender" and "shall prohibit the sender . . . from

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[2]Senate Report No. 801, *supra* note 1; *Hearings on H.R. 7977 Before the Senate Comm. on Post Office and Civil Service*, 90th Cong., 1st Sess. (1967).

the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees"; subsection (d) authorizes the Postmaster General to institute proceedings in the Federal District Court to enforce his prohibitory order; subsection (e) confers jurisdiction on the District Court to issue a compliance order enforceable by contempt proceedings; and subsection (h) makes inapplicable the provisions of the Administrative Procedure Act.[3]

The First Amendment challenge to section 4009 presents delicate constitutional problems. The statute is a novel combination of private and state action designed to limit the sending of a particular kind of advertising through the mails.

The right to send mail and the right to receive mail are reciprocal rights protected by the First Amendment. As Mr. Justice Holmes observed: "The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues. . . ." *Milwaukee Pub. Co. v. Burleson* (1921) 255 U.S. 407, 437 (dissenting opinion); *Lamont v. Postmaster General* (1964) 381 U.S. 301, 305.

First Amendment rights are not absolutes. As precious as is the freedom of expression, that right may be burdened or otherwise restricted in favor of contravening constitutional values of such compelling proportions as to take precedence over First Amendment guarantees. (*E.g., Schenck v. United States* (1919) 249 U.S. 47; *cf. New York Times Co. v. Sullivan* (1964) 376 U.S. 254.)

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[3]The full text of § 4009 is set forth in the majority opinion.

The majority opinion holds that the right of an addressee not to receive mail is a "right of privacy," which is a constitutional right of greater weight than is the sender's First Amendment right. The interest protected by section 4009 is the addressee's interest in being free from the emotional distress he suffers from reading the contents of advertising which offends him or from knowing that his young children have been thus exposed to such advertising. The addressee's interest is a private right, but it is not a constitutional right of privacy. The term "constitutional right of privacy" is admittedly a loose one, but that concept is not elastic enough to encompass in the same category a right to be free from exposure to offensive advertising, a right to be free from the intrusion of one's home by a peddler's insistent ringing of one's doorbell (*Breard v. Alexandria* (1951) 341 U.S. 622), and the right to be free from public prying into one's marital bedroom (*Griswold v. Connecticut* (1965) 381 U.S. 479, 485).

We are not here concerned with the undisputed right of every citizen to read or refuse to read his mail, to keep it or to throw it away. We enter First Amendment territory because the Government interposes itself between the sender and the addressee's mail box to relieve the addressee from seeing some of his mail.[4] That interposition is not unconstitutional simply because private rights of addressees are favored over addressors. Not everything mailed is wrapped in impervious First Amendment paper. The extent to which the Govern-

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[4]*Compare, e.g.*, Reitman v. Mulkey (1967) 387 U.S. 369. An individual can practise racial discrimination in pursuing his social relationships, but there are constitutional limitions on the power of the state to help him to do so.

ment can restrict the use of the mail depends in large part upon what is mailed. The Government can and has forbidden the transmission of obscenity through the mails. (18 U.S.C. § 1461.) Obscenity is not speech protected by the First Amendment. (*Stanley v. Georgia* (April 7, 1969) 29 CCH S. Ct. Bull. B1339; *Ginzburg v. United States* (1966) 383 U.S. 463, 467-68.) The "pandering advertisements" to which section 4009 is directed are not contraband, as is apparent from the fact that such advertisements can be mailed to anyone who wants them, but it does not thereby follow that the material is completely insulated by the First Amendment.

The degree to which the First Amendment applies to protect speech varies with society's interest in the content of that speech. "Purely commercial advertising" has never received the same kind of constitutional protection as that afforded to expressions of greater public concern. The commercial element does not altogether destroy its quality as protected speech, but it does substantially reduce the weight of the expression on constitutional scales. (*Compare Breard v. Alexandria, supra,* 341 U.S. 622, *with Martin v. Struthers* (1943) 319 U.S. 141.) Commercial advertising can be reasonably regulated without offending the First Amendment. (*Valentine v. Chrestensen* (1942) 316 U.S. 52; *see Ginzburg v. United States, supra,* 383 U.S. at 474 n. 17; *New York Times Co. v. Sullivan, supra,* 376 U.S. at 265-66.) When to the commercial element there is added a peculiar quality of offensiveness which adheres to solicitations appealing to the erotic interest. there is added a peculiar quality of offensiveness which adheres to solicitations appealing to the erotic interest, there is

even greater public interest in sustaining Congress' scheme of regulation against a First Amendment attack. (*Cf. Stanley v. Georgia, supra.*)

Plaintiffs do not claim that their mailings which resulted in prohibitory orders are anything other than strictly commercial solicitations. Plaintiffs' affidavits reveal that they have no desire to send their advertisements to anyone who is not interested in buying plaintiffs' wares. There is not a whisper in the record before us suggesting that the plaintiffs' publications contained any "editorial advertising," as did the newspaper advertisements discussed in the *New York Times* case. The plaintiffs are looking for customers, not converts. Indeed their real complaint about the impact upon them of section 4009 is that it costs them more than they care to pay to weed out the unwilling from their mailing lists and the merchandising value of their lists is accordingly reduced.

Were we dealing only with plaintiffs' advertising our First Amendment problems would be over. But we are not. The face of the statute is attacked for overbreadth. As plaintiffs read the statute, the addressee has been delegated the power to define "pandering advertisments" not only for himself, but also for the Postmaster General, the Attorney General, and the courts. No objective standard exists against which to measure the addressee's characterization. Even if the definition of "pandering advertisements" were not committed solely to the addressee, plaintiffs contend that the meaning of the term is so vague that no mailer can know whether or not his communication will fall within section 4009 and thus will subject him to prohibitory orders. The effect of section 4009, say the plaintiffs,

is to chill communications which are fully protected by the First Amendment.

Were we compelled to read section 4009 as giving the addressee unfettered discretion finally to decide which publications mailed to him are "pandering advertisements" or were we obliged to construe the prohibitory order authorized by section 4009 as encompassing all further mailings of any kind from the sender to the addressee, the statute would be overbroad. As thus read, the statute would regulate expression beyond the extent necessary to achieve the congressional purpose of enabling addressees to "turn off" the flow of pandering advertisements and it would cross the boundaries protected by the First Amendment. An addressee with a closed mind and a vivid imagination could decide that almost any kind of mail he received was a "sexually provocative" pandering advertisement. Congress exhibited no intent to give an addressee such unlimited power to stop communications from an addressor whose ideas were disagreeable to him.[5] But plaintiffs' sweeping construction of the statute is not compelled either by the language of the statute or by its legislative history.

As I construe the statute, the addressee is given the power to characterize the content of his mail for the purpose only of deciding whether or not he will re-

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[5]*See* Schwartz, *The Mail Must Not Go Through—Propaganda and Pornography*, 11 U.C.L.A. L. Rev. 805, 858 (1964): "If members of society can effectively cut themselves off from being contacted through the mail by different political parties, sponsors of unpopular views or any of the thousands of organizations which have messages to communicate, one major social avenue for balanced consideration of the issues of the day will have been destroyed. Government has no business encouraging isolation of individuals from the expression of views by others."

quest the Postmaster General to issue a prohibitory order. Neither the addressee nor the Postmaster General is delegated the power to decide which senders are within the purview of the statute. That power ultimately rests with the District Court and no sanctions against the sender can be applied until the District Court makes the decision committed to it. (*Cf. Freedman v. Maryland* (1965) 380 U.S. 51.)

Congress defined the senders to whom the statute applies in the opening lines of subsection (a) of section 4009: "Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement. . . ." The addressee's concern is limited to that tentative identification of the sender as is necessary to permit him to frame a complaint to the Postmaster General. It is not the addressee's burden to investigate the source of the offensive mail. Neither is it the business of the addressee to determine whether the sender is a person who has mailed "any pandering advertisement." The statute does not commit that responsibility to him. Rather, it gives him the discretion only to decide whether the advertisement "offers for sale matter which the addressee . . . believes to be erotically arousing or sexually provocative" as a prelude to potential court action.

The Postmaster General does no more than locate the sender and send to him the notice written by Congress in subsections (b) and (c). The only decisions the Postmaster General makes are the decision to file a complaint against a sender for alleged violation of the order, and a decision to pass the matter along to the Attorney General if, after a requested hearing, he chooses thus to seek enforcement of the order.

The term "any pandering advertisement" is not so vague as to draw within it communications entitled to full First Amendment protection. The "advertisement" component means commercial solicitation, an invitation to purchase a product. Congress' intent to refer to commercial solicitation alone is evidenced by its use of the words "which offers for sale" immediately following the term "any pandering advertisement." The boundaries of "pandering" cannot be defined with the precision of a legal description of a parcel of real property, but the meaning of the terms is not hopelessly elusive. As used in the statute, "pandering advertisement" means a commercial solicitation bearing on its fact textual or graphic matter designed to appeal solely to the erotic interest of the addressee. (*Cf. Ginzburg v. United States, supra,* 383 U.S. at 467-68.)

Plaintiffs say that the scope of the prohibitory order prescribed by section 4009 necessarily embraces publications other than pandering advertisements, because, as they read the statute, a sender is thereby forbidden to mail anything at all to a complaining addressee. (*Cf. Summerfield v. Sunshine Book Co.* (D.C. Cir. 1954) 221 F.2d 42.) I agree with the majority that the scope of the order is not that broad, but unlike the majority, I believe it is necessary to set out the reasons for that conclusion. Plaintiffs interpret the language of subsections (b) and (c) describing the contents of the order as a direction to the sender "to refrain from further mailings to the named addressees"[8] as if it said

[8]Plaintiffs find some support for their construction in the legislative history. (*E.g.*, Senate Report No. 801, *supra* note 1.) But the overriding intent was to enact a constitutional statute which would simultaneously shield senders of materials entitled to First Amendment protection from interference with their mailing rights and give to addressees offended by solicitations from commercial pornographers a remedy for their distress.

"all further mailings of whatsoever kind." I read the words "further mailings" as a reference to "further mailings of such materials," the language of subsection (a), and I interpret the words "such materials" as a reference to "any pandering advertisements," the term used in the opening phrase of subsection (a). Thus I read the phrase used in subsections (b) and (c) as if Congress had spelled out the words which are implied from the context of the statute: "from . . . further mailings of such pandering advertisements." (*Cf. Summerfield v. Sunshine Book Co., supra.*)

Plaintiffs argue that the effect of a prohibitory order, even as thus narrowly construed, is to deprive them of their property without due process of law. The argument assumes that plaintiffs have a property right in their mailing lists which is impaired by the prohibitory order. The assumption is a dubious one, but even if the assumption is accepted, *arguendo,* it does not help the plaintiffs. Even the plaintiffs do not suggest that they have a property right in each name on the list. All the prohibitory order does is to direct the plaintiffs to remove the names of complaining addressees before they can trade in the lists. Plaintiffs admit that the complainers are not valuable addressees and that they do not want them on their lists. They are in no position to argue that they have been hurt by a direction to jettison names which are worthless to them.

If it is assumed that plaintiffs were entitled to raise the due process argument with respect to senders other than themselves, again a dubious assumption, the statute is still immune from due process attack. The prohibitory order is not in the nature of a sanction. Noth-

ing happens to a recalcitrant sender who refuses to comply with the Postmaster General's order. No penalty of any kind is or can be imposed until the District Court has issued a compliance order, the sender has disobeyed that order, and the District Court has held him in contempt. (39 U.S.C. § 4009, subsec. (d) and (e).) Before a compliance order can be issued by the District Court, the sender is entitled to an adversary hearing in which he is accorded an opportunity to present fully all of his defenses, including constitutional ones. (*See Reisman v. Caplin* (1964) 375 U.S. 440.) At that hearing, the court and not the addressee, the Postmaster General, or the Attorney General decides the question: Was the sender a person who has mailed or caused to be mailed any pandering advertisement? Due process is fully satisfied by that procedure.

I conclude that section 4009 is not unconstitutional on its face or as it has been applied to the plaintiffs, under the provisions of the First and Fifth Amendments to the United States Constitution. The statute as I construe it is not overbroad and its terms are not fatally vague. It does not unlawfully delegate power to the addressees, to the Postmaster General, or to the Attorney General. Its application to the plaintiffs does not deprive them of their property without due process of law. The remaining contentions of the parties are adequately discussed in the majority opinion, or are points which require no comment.

Shirley M. Hufstedler

Shirley M. Hufstedler

Circuit Judge

APPENDIX "C".

Rules of Practice in Proceedings Relative to Violations Under 39 U. S. Code 4009.

.....F.R.....

39 C.F.R. Part 956

956.1 Authority for the Rules

The rules of practice are issued by the General Counsel of the Post Office Department pursuant to the authority delegated by the Postmaster General. (F.R.).

956.2 Scope of the Rules

The rules of practice shall be applicable to administrative hearings requested pursuant to 39 U.S. Code 4009(d). The provisions of Subchapter II of Chapter 5 (relative to administrative procedures) and Chapter 7 (relative to judicial review) of Part I of Title 5, U.S. Code, shall not apply to the (administrative) hearings conducted under 39 U.S. Code 4009(d).

956.3 Notice of Demand for Hearing

(a) Respondent served with a complaint by the postmaster charging violation of 39 U.S. Code 4009, may request a hearing on the issues. The mailer shall file a written request for such hearing with the postmaster no later than 15 days from the date of receipt of a complaint issued pursuant to *Paragraph (d) of 39 U.S. Code 4009*.

(b) The postmaster, upon receipt of a request for a hearing from the respondent, shall promptly forward such request with the file in the matter to the appropriate regional counsel.

956.4 Notice of Hearing

(a) The regional counsel, upon receipt of the respondent's request for a hearing, shall serve upon the

respondent, by registered or certified mail, a notice of hearing setting forth the date, time, and place of hearing, and the name of the hearing officer who will preside. A copy of the rules will accompany the notice of hearing.

(b) Whenever practicable, the hearing date will be within 30 days from date of the notice of hearing served on the mailer.

(c) Requests for continuances and extensions of the scheduled hearing date shall be filed with the hearing officer and such requests, within the discretion of the hearing officer, shall not be granted except for good and substantial reasons shown.

(d) The parties in the proceeding initiated under 39 U.S. Code 4009 shall be the mailer, referred to as "Respondent", and the postmaster, referred to as "Complaint".

956.5 Hearing Officers

The presiding officer at the hearing held hereunder shall be the appropriate regional counsel of the Post Office Department designated in accordance with *Section 956.4 of the Rules.*

956.6 Change of Place of Hearing

Requests for change of place of hearing based on good and substantial reasons therefor, may be filed with the hearing officer. Such requests may be granted or denied, within the discretion of the hearing officer, who shall consider the convenience and necessity of all parties concerned and the jurisdictional requirements.

956.7 Conduct of the Hearings

(a) Testimony shall be under oath and witness shall be subject to cross-examination.

(b) Hearings shall be stenographically reported by postal personnel, or if necessary, a contract reporter of the Post Office Department under the supervision of the hearing officer. Copies of the transcript shall be supplied to the parties to the proceeding by Post Office personnel at the rates provided by Section 113, Postal Manual, or if by the reporter, at rates not to exceed the maximum rates fixed by the contract between the Post Office Department and the reporter.

(c) A party may object to admissions of evidence and shall make a brief statement of the grounds for the objections. Formal exceptions to the rulings of the presiding officer are unnecessary.

(d) All relevant and material evidence is admissible, including hearsay evidence of a trustworthy nature.

(e) The Post Office Department is not authorized by law to issue subpoenas requiring the attendance or testimony of witnesses or the production of documents.

(f) The Post Office Department is not authorized to pay fees and expenses for the respondent's witnesses or for depositions requested by the respondent pursuant to *Section 956.8 of the Rules.*

956.8 Depositions

(a) Not later than 5 days after receipt of a notice of hearing by respondent under *Section 956.4 of the Rules,* either party may file with the hearing officer for the taking of testimony by deposition. A copy of the request shall be served on complainant. Requests shall contain a statement under oath, signed by the respondent, setting out the reasons for the request, the time and place for the taking of depositions, the name and address of the person before whom the deposition will be taken, and the name and address of the witness

or witnesses whose deposition or depositions are sought. The statement shall also show the relevancy of the testimony to be adduced. The granting or denying of the request shall lie within the discretion of the presiding officer.

(b) Parties shall have the right to examine witnesses at the taking of depositions and to interpose objections to questions. Testimony shall be under oath. The deposition officer shall file the testimony taken, as directed by order of the hearing officer.

(c) The party requesting the deposition shall pay all fees required to be paid to witnesses and the deposition officer.

(d) All or any part of the deposition may be offered in evidence at the hearing by any party and shall become part of the record in the proceeding. If the deposition is not offered and received in evidence, it shall not be considered part of the record.

956.9 Submission in Lieu of Testimony

(a) In lieu of presenting testimony at a hearing, the parties may, with the approval of the hearing officer, enter into a stipulation for the submission of verified documentary evidence to the hearing officer. The hearing officer will render a decision on the issue of alleged violation of 39 U.S. Code 4009 based solely on the evidence submitted.

(b) Submissions by the parties may be accompanied by a memorandum in support of respective positions on the issue or issues involved.

(c) A party against whom an adverse decision has been rendered by the hearing officer, may file an appeal from such decision, in accordance with *Section 956.12 of the Rules.*

956.10 Consolidation

(a) Where the postmaster has issued an Order or Orders directed to the respondent, under 39 U.S. Code 4009, involving more than one designated address, the hearing officer may order a consolidation of the matter for hearing on the issues.

(b) In lieu of a consolidation order by the hearing officer, parties may undertake a stipulation providing for consolidation of the matter for hearing on the issues.

956.11 Decisions

The hearing officer shall render his decision at the conclusion of the hearing, or within a reasonable time after submission, pursuant to *Section 956.9 of the Rules*. In the alternative, the hearing officer may reserve his decision at the conclusion of the hearing and render a written decision within a reasonable time thereafter. Parties may be requested to submit briefs in support of recommended findings, at the discretion of the hearing officer.

956.12 Appeals

(a) A party may file an appeal from an adverse decision of the hearing officer. Appeals must be filed no later than 15 days from date of issuance of the hearing officer's decision. An appeal shall be initiated by the filing of a Notice of Appeal and supporting briefs, with the Assistant General Counsel, Mailability Division, Post Office Department, Washington, D.C. 20260.

956.13 Waiver of Right to Appeal

In the event the respondent files a response pursuant to *Paragraph (d) of 39 U.S. Code 4009* and does not

request a hearing on the issues, he shall be deemed to have waived the provisions of *Section 956.11 of the Rules,* in which event the determination by the complainant as to violation of 39 U.S. Code 4009 shall become the final Departmental decision, from which no appeal shall lie.

956.14 Settlement Agreements

(a) Those rules do not preclude the disposition of any matter by agreement between the parties at any stage of the proceeding and in accordance with Paragraphs "(b)" and "(c)" below.

(b) Settlement agreements undertaken between the parties after filing of a demand for a hearing shall be subject to the approval of the hearing officer.

(c) Settlement agreements between the parties subsequent to the filing of an appeal shall be subject to approval of the appellate officer—the Assistant General Counsel, Mailability Division.

/s/ TIMOTHY J. MAY
Timothy J. May
General Counsel
Post Office Department

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 399

DANIEL ROWAN, D.B.A. AMERICAN BOOK SERVICE, ET AL., APPELLANTS

v.

UNITED STATES POST OFFICE DEPARTMENT, ET AL.

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the Solicitor General, on behalf of appellees, moves that the judgment of the district court be affirmed.

STATEMENT

Appellants have taken this direct appeal, under 28 U.S.C. 1253, from an order of a three-judge district court, convened pursuant to 28 U.S.C. 2284, denying injunctive relief and granting appellees' motion to dismiss the complaint (J.S. 10–11). Appellants herein are, *inter alia*, book publishers and distributors, operators of mail order houses, and mailing-list brokers. All are connected, in one manner or another, with commercial solicitation through use of the mails.

On December 16, 1967, heeding the "[h]undreds of thousands of complaints [which] are received annually by the Post Office Department and individual Members of Congress about the repeated receipt of unsolicited mail which is obscene, obnoxious, or otherwise offensive to the recipient,"[1] Congress enacted Public Law 90–206 (81 Stat. 645), which was subsequently codified as 39 U.S.C. (Supp. IV) 4009. Under Section 4009, effective as of April 15, 1968, any private citizen who receives any "pandering advertisements" offering for sale any materials which he "in his sole discretion believes to be erotically arousing or sexually provocative," may request the Postmaster General to direct the mailer to refrain from further mailings of such materials.[2] Upon receipt of such a request, the Postmaster General is authorized to issue an order prohibiting future mailings of such materials to the designated addressee. Prior to the enforcement of any such order, the mailer has a right to an administrative and a judicial hearing.

During the period following April 15, 1968, various addressees who had received what they considered to be such pandering advertisements of obscene materials from one or another of appellants, notified the Postmaster General of that fact and requested the issuance of the prohibitory orders authorized by Section 4009. Such orders were issued and many are currently outstanding against appellants.

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[1] S. Rep. No. 801, 90th Cong., 1st Sess., p. 37.

[2] The full text of 39 U.S.C. 4009 is set out in the Appendix, *infra*, pp. 11–13.

By complaint filed September 18, 1968, appellants collectively sought to enjoin the Postmaster General from enforcing Section 4009 and to have that provision declared unconstitutional on the grounds, *inter alia*, that insofar as it inhibits the circulation of their advertisements it violates their rights to freedom of speech and press protected by the First Amendment. Appellants also claimed various deprivations of their right to due process in violation of the Fifth Amendment.

The three-judge district court, with one judge concurring specially but without dissent, dismissed the complaint. It concluded, in effect, that Section 4009 merely authorizes the Postmaster General to prohibit mailings of unwanted materials to unwilling recipients, not to the community in general (J.S. App. 6). In the court's view, appellants have no constitutionally protected right to impose their materials on persons who have affirmatively indicated that they desire not to receive them.

ARGUMENT

The district court correctly concluded that 39 U.S.C. 4009 violates none of appellants' constitutional rights. The points raised by appellants are not sufficiently substantial to warrant plenary consideration by this Court. Accordingly, it would be appropriate for the Court to affirm the judgment below summarily.

1. Section 4009 provides a procedure whereby an individual addressee may decide, for himself and his family, to keep from his home pandering advertisements which he considers to be personally offensive and obscene. The addressee may then enlist the aid

of the Post Office Department and the courts in enforcing that determination. Thus, the statute does not invest the Postmaster General with the functions of a public censor; instead, it simply allows him to carry out the wishes of private citizens who do not wish to receive certain types of mail.[3] Indeed, no other feasible way of accomplishing this objective is readily apparent.

The remedy thus accorded private individuals is based upon a simple proposition: the right to speak to the community at large may be made to yield to a citizen's countervailing right to privacy in his own home. Resort to this Court's First Amendment teachings reveals that this proposition is plainly valid.

First, we emphasize the fact that Section 4009 does not purport to authorize any curtailment whatever of the flow of books, pamphlets, pictures or other forms of traditionally protected written materials. The statute authorizes the Postmaster General, upon request, to prohibit future mailings of *pandering advertisements only* (J.S. App. 9); 39 U.S.C. 4009(a). In these circumstances, it is pertinent to recall that, whatever may be the limitations on Congress' right to control the free flow of ideas, the "Constitution imposes no

[3] Under the original, draft version of Section 4009 (H.R. 7977), the discretion to decide which advertisements were "erotically arousing or sexually provocative" (and hence non-mailable to designated addressees) would have been invested, not in the individual addressee involved, but in the Postmaster General. See H. Rep. No. 722, 90th Cong., 1st Sess., p. 125. Substitution of the present statutory scheme was designed to remove any constitutional objection on grounds of censorship by the Postmaster General. 113 Cong.. Rec. 28659–28661.

such [First Amendment] restraint on government as respects purely commercial advertising." *Valentine* v. *Chrestensen*, 316 U.S. 52.[4] Compare *Jamison* v. *Texas*, 318 U.S. 413, 417.[5]

But even assuming *arguendo* that appellants' materials enjoy the same range of First Amendment privileges accorded to other forms of expression, that fact would not render Section 4009 unconstitutional. Appellants' right to disseminate their materials would

[4] As summarized in *Breard* v. *Alexandria*, 341 U.S. 622, 627: "[E]xigencies of trade are not ordinarily expected to have a higher rating constitutionally than the tranquility of the fireside * * *." And see *Ginzburg* v. *United States* 383 U.S. 463, 474, n. 17, stating: "Material sold solely to produce sexual arousal, *like commercial advertising*, does not escape regulation because it has been dressed up as speech * * *" (emphasis added).

[5] Application of the principles of *Valentine* seems especially justified in the instant case. Section 4009 has the effect of curbing the flow of mail only to those who already have shown that they do not wish to receive it. It scarcely can be claimed that the right to continue to send mail to persons who do not wish to receive it is one of value requiring protection by this Court. Yet, that is the essence of the constitutional right appellants seek to claim here—the right to be wholly unfettered in sending, through the mails, commercial advertisements to those who have indicated a specific aversion to receiving such materials from them. Nothing in this Court's First Amendment precedents, nor in the history of that constitutional provision, recognizes such a right. Nor, apparently, are appellants actually concerned with protecting that right. While framing their papers below in terms of the right of free speech, appellants' supporting affidavits reveal that actually it is not this right which they seek to vindicate. Rather, their principal objective is simply to avoid the costs, imposed as a result of compliance with prohibitory orders issued pursuant to Section 4009, of deleting the names of complaining addressees from their mailing lists (see J.S. App. 21). Thus, appellants invoke the First Amendment to help them keep down the costs of doing business as publishers, distributors, and brokers.

in no event be absolute, but would have to be exercised so as not to interfere with the countervailing rights of others. See, *e.g.*, *Cameron* v. *Johnson*, 390 U.S. 611; *Poulos* v. *New Hampshire*, 345 U.S. 395; *Feiner* v. *New York*, 340 U.S. 315; *Chaplinsky* v. *New Hampshire*, 315 U.S. 568; *Cox* v. *New Hampshire*, 312 U.S. 569. Indeed, as this Court has said, where the countervailing right involved is the paramount right to the privacy and enjoyment of one's own home, the right to speak must yield. *Breard* v. *Alexandria*, 341 U.S. 622; *Kovacs* v. *Cooper*, 336 U.S. 77; *Saia* v. *New York*, 334 U.S. 558.[6] Cf. *Griswold* v. *Connecticut*, 381 U.S. 479; *Camara* v. *Municipal Court*, 387 U.S. 523; *See* v. *City of Seattle*, 387 U.S. 541.

To be sure, this Court has questioned the community's right to decide beforehand just which speech will or will not be acceptable to all of its inhabitants within the privacy of their own homes. To paraphrase Mr. Justice Black, in such situations involving prior restraint government should not offer to protect the interests of all of their citizens, whether particular citizens want that protection or not. *Martin* v. *City of Struthers*, 319 U.S. 141, 143. At the same time, however, this Court has plainly recognized that, even where the effect is to curtail speech, it is perfectly

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[6] As observed in *Kovacs* v. *Cooper*, *supra*, 336 U.S. at 88, relied upon by the court below:

"The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be unsensible to claims by citizens to comfort and convenience. *To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself* * * *" (emphasis added).

permissible for each resident to make that determination for himself. *Martin* v. *City of Struthers, supra,* 319 U.S. at 142, 147, 148; *Breard* v. *Alexandria, supra,* 341 U.S. at 632–633, 641–645; see *Lamont* v. *Postmaster General,* 381 U.S. 301, 310 (Brennan, J., concurring).[7] In *Lamont,* it should be noted, the Court was principally concerned with "a limitation on the unfettered exercise of the addressee's First Amendment rights" (*id.* at 305). Indeed, the Court there impliedly approved a Post Office regulation which, for First Amendment purposes, is identical to the statute here at issue (*id.* at 304, n. 2; 310). Appellants' extensive reliance on *Lamont* is thus misplaced.[8]

As the district court found, Section 4009 "is only an implementation of the right of an individual to choose what it is he desires to see and read within his own personal sensitivity and concept of privacy" (J.S. App. 7). Since the right to speak confers no right to intrude on an unwilling listener within the confines of his own residence, appellants cannot complain that Section 4009 has infringed that right.

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[7] Of course, once a resident has chosen to invoke his right to the privacy of his own home, the community is free to see to it that that choice is respected. *Martin* v. *City of Struthers, supra,* 319 U.S. at 148. Cf. *United States* v. *Raines,* 362 U.S. 17, 27; *United Steelworkers* v. *United States,* 361 U.S. 39, 43.

[8] Similarly, *Speiser* v. *Randall,* 357 U.S. 513, on which appellants also rely, does not support their position. There the burden was placed on individuals to come forward and take an oath to support their claim to certain tax exemptions, in circumstances where, the Court concluded, "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech" (*id.* at 519). No such situation exists under the statute here challenged.

2. The district court also properly concluded that Section 4009 deprived appellants of no other constitutional rights.

a. The statute authorizes any addressee to take steps to cut off the flow to his home of "pandering advertisements" which he, in his sole discretion, believes to be "erotically arousing or sexually provocative." Appellants contend that, as thus framed, Section 4009 is void for vagueness. This contention is untenable. Initially, there is nothing intrinsically vague about the foregoing phrases. Indeed, variations of these terms have long been used by the federal courts in obscenity litigation. See, *e.g., Ginzburg* v. *United States,* 383 U.S. 463, 467, 470; *Roth* v. *United States,* 354 U.S. 476, 490, 491.

In any event, appellants can hardly claim injury by reason of vagueness. A statute generally is considered fatally vague only where it exposes a potential actor to some risk or detriment for the performance of particular conduct, without giving fair warning of the nature of that conduct. *United States* v. *Cardiff,* 344 U.S. 174; *American Communications Ass'n* v. *Douds,* 339 U.S. 382.[9]

Appellants, however, run no risks of miscalculation here. See *Boutilier* v. *Immigration & Naturalization Service,* 387 U.S. 118, 123. Even after the entry of a prohibitory order, relating to one or more individual

[9] Of course the risk need not be penal in nature. In the freedom of speech area, for example, one who cannot understand in advance which types of expression have been curbed runs the risk of being unable to disseminate his ideas to the community at large. See, *e.g., Interstate Circuit, Inc.* v. *Dallas,* 390 U.S. 676, 684.

addressees, appellants' materials continue to enjoy free access to the remainder of the community. Nor is there any risk of punishment for unwittingly offending a particular addressee. One who has mailed objectionable materials is merely subject to an order to refrain from future mailings of similar matter to the same addressee. And even if the mailer continues to send such materials to that particular addressee, in direct violation of the Postmaster General's order, he is still subject to no sanctions until the Attorney General has first secured a compliance order from a district court. 39 U.S.C. 4009(d). Only at that point does the mailer—already keenly aware of which types of materials, sent to which individuals, have been proscribed—become subject to penalty, *i.e.*, contempt for continued disregard of the order. 39 U.S.C. 4009(e).

b. Appellants' other contentions are equally devoid of merit. There is no problem here of an unlawful delegation of the congressional power to legislate; for it is Congress which has determined which types of mail matter may be barred from the home, *i.e.*, pandering advertisements which the addressee finds erotic or sexually arousing. The addressee's authority to determine when such materials have been received is merely an exercise of discretion under existing law. See *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 577; *Currin* v. *Wallace*, 306 U.S. 1, 15–16; *Cusack Co.* v. *City of Chicago*, 242 U.S. 526, 529–531. Indeed, since Section 4009 seeks to protect the addressee's right of privacy, the addressee is best suited to decide, at least in the first instance, the situations in which he will invoke the statute.

Finally, appellants have been deprived of no right to due process of the law. Before they can be punished for violating the Postmaster General's prohibitory order they are accorded the right to an administrative hearing, at which point they may establish that they have not violated his order. 39 U.S.C. 4009(d). In addition to this hearing, we view the statute as granting appellants an additional opportunity to present their views during the compliance proceedings before the district court (*ibid.*). This is followed by still a third opportunity at any contempt proceedings which might ensue, at which a mailer may seek to justify his actions. These guaranteed opportunities for a judicial determination of the matter are plainly sufficient to protect appellants' rights and guard against any denial of due process.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.
ROBERT V. ZENER,
ROBERT M. HEIER,
Attorneys.

AUGUST 1969.

APPENDIX

39 U.S.C. (Supp. IV) 4009:

§ 4009. Prohibition of pandering advertisements in the mails.

(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postmaster General to refrain from further mailings of such materials to designated addressees thereof.

(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postmaster General shall issue an order, if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees.

(c) The order of the Postmaster General shall expressly prohibit the sender and his agents or assigns from making any further mailings to the designated addressees, effective on the thirtieth calendar day after receipt of the order. The order of the Postmaster General shall also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents

or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

(d) Whenever the Postmaster General believes that the sender or anyone acting on his behalf has violated or is violating the order given under this section, he shall serve upon the sender, by registered or certified mail, a complaint stating the reasons for his belief and request that any response thereto be filed in writing with the Postmaster General within fifteen days after the date of such service. If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a district court of the United States for an order directing compliance with such notice.

(e) Any district court of the United States within the jurisdiction of which any mail matter shall have been sent or received in violation of the order provided for by this section shall have jurisdiction, upon application by the Attorney General, to issue an order commanding compliance with such notice. Failure to observe such order may be punished by the court as contempt thereof.

(f) Receipt of mail matter thirty days or more after the effective date of the order provided for by this section shall create a rebut-

table presumption that such mail was sent after such effective date.

(g) Upon request of any addressee, the order of the Postmaster General shall include the names of any of his minor children who have not attained their nineteenth birthday, and who reside with the addressee.

(h) The provisions of subchapter II of chapter 5 (relating to administrative procedure) and chapter 7 (relating to judicial review) of part I of title 5, United States Code, shall not apply to any provisions of this section.

(i) For the purposes of this section—

(1) mail matter, directed to a specific address covered in the order of the Postmaster General, without designation of a specific addressee thereon, shall be considered as addressed to the person named in the Postmaster General's order; and

(2) the term "children" includes natural children, stepchildren, adopted children, and children who are wards of or in custody of the addressee or who are living with such addressee in a regular parent-child relationship.

U.S. GOVERNMENT PRINTING OFFICE: 1969

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[illegible]

October Term, 1969
No. 69-

DANIEL ROWAN, d.b.a. AMERICAN BOOK SERVICE, et al.,

Appellants,

vs.

UNITED STATES POST OFFICE DEPARTMENT, et al.,

On Appeal From the United States District Court for the Central District of California

OPPOSITION TO MOTION TO AFFIRM

JOSEPH TABACK,
GOLD, HERSCHER & TABACK,
8500 Wilshire Boulevard,
Suite 703,
Beverly Hills, Calif. 90211,
Attorneys for Appellants.

Taylor & Sons, Inc., Law Printers, Los Angeles. Phone 625-9700

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IN THE

Supreme Court of the United States

October Term, 1969
No. 399

DANIEL ROWAN, D.B.A. AMERICAN BOOK SERVICE, *et al.*,

Appellants,

vs.

UNITED STATES POST OFFICE DEPARTMENT, *et al.*,

On Appeal From the United States District Court for the Central District of California.

OPPOSITION TO MOTION TO AFFIRM.

Statement.

Respondents have filed a Motion to Affirm a judgment of a Three-Judge District Court. Said District Court was convened pursuant to 28 U.S.C. 2284 and a direct appeal was lodged under 28 U.S.C. 1253.

To reiterate the facts would be unduly oppressive in its repetition. Appellants therefore proceed to argument in opposition to the Motion to Affirm.

ARGUMENT.

The questions raised by appellants require plenary consideration by this Court. It would be sufficient to note the opinion of the concurring judge in the District Court opinion appealed from herein wherein she states, "The First Amendment challenge to Section 4009 presents delicate constitutional problems. The statute is a novel combination of private and state action designed to limit the sending of a particular kind of advertising through the mails. No more convincing argument need be made to inspire the invocation of this Court's jurisdiction over the questions presented by this appeal.

The rights involved are those fundamental rights inherent in and critical to this society. The attempted intrusion and erosion of those rights occur by way of a sweeping novel and new approach. Therein is a sufficient cry for plenary consideration by this Court.

> "The United States may give up the Post Office when it sees fit, but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues. . ."
>
> *Milwaukee Publishing Co., v. Burleson*, 255 U.S. 407, 437.

The legal truth of that pronouncement by Justice Holmes by itself should place the issues and questions herein before this Court for consideration. However, in addition the following reasons are offered.

1. The decision of the District Court which is appealed herein stands directly in conflict with the decision of a Federal District Court in another part of our country. The majority opinion in this matter pre-

sented herein seemed to base its justification of constitutionality upon the concept of privacy. However, in the case of *Lamont v. Commissioner of Motor Vehicles,* 269 F. Supp. 80, the Court stated:

> ". . . The mailbox, however noxious its advertising contents, often seem to Judges, as well as other people, is hardly the kind of enclave that requires Constitutional defense to protect 'the privacies of life'. In short, the regular journey from mailbox to trash can—the contents of which the State chooses to pay the freight when it facilitates the distribution of trash—is an acceptable burden, at least so far as the Constitution is concerned. The bells at the door and on the telephone, through their ring, is a more imperious nuisance than the mailman's tidings, accomplish more peripheral assaults than the blur of an inescapable radio."

That court further stated:

> "In his contrary thesis, plaintiff proposes to stretch the Constitutional dimensions of 'privacy' far beyond any reasonably foreseeable limits the Courts ought to enforce. . . ".

The conflict presented by the views of two Federal Courts warrants the consideration of this Court so that resolution of such fundamental questions be made clear and known.

2. The majority opinion set forth as Appendix "A" to Appellants Jurisdictional Statement approaches the problem as if two private individuals were involved, one with the other and as if governmental participation, intrusion, enforcement, or implementation were not present. The view taken therein therefore leads to the

conclusion that the purported right of privacy entitles itself to a more preferred position than the Appellants' right to use the mail which is embodied within the First Amendment of the Constitution.

This approach does not take cognizance that 39 U.S.C. 4009 provides in paragraph (c) that in addition to the order directing the appellants to refrain from further mailing that the Postmaster General shall expressly prohibit the sender (Appellants herein) and his agents or assigns from making any further mailings to the addressee and that further the Postmaster General shall also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents or assigns and, further, to prohibit the sender and his agents or assigns from the sale, rental, exchange or other transactions involving the mailing lists bearing the names of such a designated addressee.

In subsection (d) of said statute, it is the Postmaster General who determines if any order has been violated and who is given authority once he so determines, to request the Attorney General to make application to a District Court of the United States for an order directing compliance with such a notice or order. Further violation of such procured order could lead to contempt of court.

To argue that these powers are merely ancillary to a purported right of privacy and are in no way governmental intrusions or encroachments upon First Amendment rights would be to hurl our judicial system back before the time of *Shelly v. Kramer,* 334 U.S. 1, and into the era of the fictions which upheld

Constitutional erosions and intrusions in the name of nongovernmental activity. The issue is clear. If this is governmental activity, can the Congress of the United States grant the powers it has so attempted to do and in the manner it has to intrude upon free speech and press? If this is truly private individual action with no significant governmental participation, by what criteria and indicia is it ascertained which is the greater right under the First Amendment?

Indeed, if the Postmaster General were lodged with the initial power to determine what is erotically arousing or sexually provocative (within his sole discretion) as same may flow through the mails, and if the Postmaster General could thereafter order the refraining of the use of mails predicated upon this determination, plenary consideration of that issue would be warranted. Can it be said therefore that the granting of the same power to private individuals has now insulated the exercise of power so that this Court can find no true justification to review the statute?

The question has been answered by this Court and other courts of this land on many occasions. *Speiser v. Randall,* 357 U.S. 513, 518; *Manuel Enterprises v. Day,* 370 U.S. 478, 504; *Near v. Minnesota,* 284 U.S. 697; *Summerfield v. Sunshine Book Company,* 95 U.S. App. D.C. 169, 221 F. 2d 42; *Walker v. Popenoe,* 149 F. 2d 511.

3. The Specially Concurring Memorandum Opinion in this matter which is attached to Appellants' Jurisdictional Statement as Appendix "B" gives further support to the necessity that this matter be reviewed and determined by this Court. Circuit Judge Hufstedler

in the Specially Concurring Memorandum Opinion states:

> ". . . *In my view the statute can be salvaged by meticulously construing its provisions to shrink its loosely woven fabric to Constitutional size and by applying to the statute, as thus construed, settled Constitutional doctrine. It cannot be saved by submerging the First Amendment problems, as does the majority opinion, by invoking an amorphous concept of the right of privacy.*" (Emphasis added).

The Judge then proceeds to shrink the statute because if applied as intended by Congress and as urged by the Attorney General of the United States[1] the Constitutional rights as provided in the First and Fifth Amendments of the Constitution of the United States become smothered by the blanket approach and attempt of 39 U.S.C. Section 4009.

Both Court and the moving party attempt to elevate their arguments and position for affirmation by speaking in terms of Congress' attempt to handle the sending of obscene material through the mails. Congress enacted legislation to handle the dissemination of obscene material through the mails[2] many years ago.

39 U.S.C. 4009 deals with material that is less than obscene. It deals with materials of advertising content that are in the sole discretion of recipient sexually provocative and erotically arousing. Pages 2 and 3 of Respondents' Motion to Affirm speaks of "pandering ad-

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[1]Reporters Transcript of Proceedings Partial page 6, line 25 through page 8, line 13.

[2]18 U.S.C. 1462, 39 U.S.C. 4006, 4007.

vertisements of obscene materials." Appellants respectfully submit that if Congress had intended to prohibit obscene material by its legislation, it would have used that language. It is clear that Congress has selected a broader field upon which to impose rampant censorship. Respondent's misstatements lends no dignity to the argument.

There are those in our society who find the tale of Adam and Eve erotically arousing or sexually provocative. There are those who find their monthly statements from the department stores which often times carry photographs of female and male models in various states of reasonable attire sexually provocative and erotically arousing. The list could continue at great length. The tragically frightening point, however, is that when such a determination is made and once this statute is invoked, a process is put in motion that ultimately leads to the reality of a contempt citation issued from a Court of the United States.

Further it is imperative to recall the following:

(a) The unfettered, and completely discretionary determination by an addressee starts the process; and

(b) The Government's position, as well as the language of the statute prohibits any type of mailing to a complaining recipient of any type of material; and

(c) The duty of the Postmaster General to prohibit the transacting and dealing with lists containing the name of such an initiating addressee; and

(d) The question of who shall determine whether a subsequent mailing is of similar matter (if respondent's position is adopted)[3] and,

(e) Why may not a mailer transact with a list containing the name of a complaining addressee if in fact it is permissible as Respondent contends, for the mailer to send non-offensive material through the mail; and

(f) Why does the United States Post Office conduct the hearings provided for in 39 U.S.C. 4009; and

(g) Why does the United States Post Office act as both prosecutor and judicial officer at such hearing; and

(h) Why may Appellants not cross examine complaining addressees.

Not only do the issues raised by this appeal as set forth in Appellants' Jurisdictional Statement warrant consideration but inherent in those issues are the foregoing questions and much more. The issues cannot be summarily dismissed by "shrinking the loosely woven fabric of this statute". Whether the fabric of the statute is shrunk or not, it remains so large as to completely envelope the First and Fifth Amendments of the Constitution of the United States.

Appended hereto is a newspaper article as disseminated by United Press International and published in the Los Angeles Times September 12, 1969. The incongruities and inconsistencies as well as the constitutional imperatives of this statute are probably more

[3]Respondents' Motion to Affirm, page 9.

graphically depicted in that article than in this document in opposition to the Motion to Affirm.

4. Respondents would seek affirmation of the judgment herein on the grounds that Appellants merely seek redress in this action because of the purported excessive cost in attempting to comply with 39 U.S.C. 4009. Summarily, let it be noted that the cost factor raised in the case below and as mentioned in the jurisdictional statement was only to indicate additional reasons for the necessity of injunctive relief. Appellants believe that this is obvious and no further comment is necessary.

5. Appendix to Appellants' Jurisdictional Statement as Appendix "C", are the Rules of Practice in proceedings relative to violations under 39 U.S. Code 4009. They are designated as 39 C.F.R. Part 956. A reading of these rules once again makes plenary consideration of the issues involved in this appeal necessary.

6. Respondents attempt to gain comfort from the case of *Boutilier v. Immigration and Naturalization Service,* 87 S. Ct. 1563, 387 U.S. 120; 387 U.S. 118. Respondents urge that the statute is not vague nor that it is an unlawful delegation of powers.

The lack of standards causes the statute here in question to fail when tested against the Constitutional safeguards provided to persons in this free society. It is clear that Congressional enactments which are vague and standardless, are repugnant to the Constitution and have consistently been struck down. *Winters v. New York,* 333 U.S. 507; *Giacco v. Pennsylvania,* 382 U.S. 399; *Arizona v. California,* 373 U.S. .... 625, 626.

In conjunction with the vagueness of this statute and its lack of standard is the attempted unlawful dele-

gation of power, 39 U.S.C. 4009 purports to repose in the addressee all the powers of the three branches of this Federal Government.

The words of Justice Cardozo in his concurring opinion in *Schecter Poultry Corp. v. United States*, 295 U.S. 495, wherein describing the NRA Code he said of the statute it was, "A delegation running riot" applies with equal vigor here.

In the case of *Arizona v. California*, 373 U.S. ..... 626; Justice Harlan announced:

> ". . . The principle that authority granted by the legislature must be limited by adequate standards serves two primary functions vital to preserving the separation of powers required by the Constitution. First, it inures that the fundamental policy decisions in our society will be made not by an appointed official, but by the body immediately responsible to the people. *Second*, it prevents judicial review from becoming merely an exercise at large by providing the Courts with some measure against which to judge the official action which has been challenged."

39 U.S.C. 4009 grants broad discretionary powers to private individuals. Its language is such that one cannot determine whether further mailings are any mailings or similar mailings. It cannot be ascertained who will determine or decide what is a similar mailing. Indeed it is not clear whether advertisements for sacks of potatoes may be prohibited. The statute is so broad and so standardless that Respondents themselves are in disagreement with the Court's interpretation of the statute.

If this were but the single issue raised by this appeal, plenary consideration would be warranted.

7. Asserting that Appellants' activities are commercial in nature gives no basis for affirmation of the judgment of the Court below. This Court has, on numerous occasions, spoken to the question. *Hannegan v. Esquire, Inc.*, 327 U.S. 146. Furthermore, if indeed the doctrine of *Valentine v. Chrestensen,* 316 U.S. 52 is applicable as contended by Respondent, it should be enunciated by this Court within the context of this delicate situation. No higher position is being sought for commercial activity by Appellant, nor is it contended that expression, commercial or otherwise is necessarily free from all restraint. What is being questioned here is whether 39 U.S.C. 4009 in attempting to regulate the free flow of materials, ideas and advertising has been done via the statute in a constitutional manner. This is an issue warranting consideration by this Court.

8. The cases of *Breard v. Alexandria,* 341 U.S. 622, and *Ginzburg v. United States,* 382 U.S. 463, as well as most of the other cases cited by Respondent were scrutinized and argued by Appellant in the Court below and are contained in the certified transcript presented to this Court under the cover of the Memorandum in Support of Plaintiffs' (Appellants herein) Motion for Preliminary Injunction. Further, many of the cases were also considered. The case of *Lamont v. Commissioner of Motor Vehicles,* 269 F. Supp. 880 by Judge Frankel and do not warrant any further discussion at this juncture.

Conclusion.

For the foregoing reasons, the Motion to Affirm should be dismissed and the issues raised on the appeal be considered by this Court.

Respectfully submitted,

JOSEPH TABACK,
GOLD, HERSCHER & TABACK,
Attorneys for Appellants.

APPENDIX "A."

Man Halts All His Junk Mail Is Obscene

ANN ARBOR, Mich. (UPI) — If an advertisement for a sack of potatoes looks obscene to you, then it's obscene. And you can stop the mailman from leaving it at your door.

Obscenity, according to law, rests squarely in the eyes of the beholder.

Using that principle as his weapon, an Ann Arbor man has found the way to stop the flow of junk mail to his mail box.

Tired of the barrage of advertising circulars, Roger Staples complained that the food and department store advertising he received was obscene.

He sent the stuff back to his post office and demanded that no more of it ever darken his doorstep again.

Returns Mail

Richard Schneeberger, assistant postmaster at Ann Arbor, returned the mail to Staples. "The department store and food ads for which you signed cannot be considered as pandering in nature," he wrote.

Not so, Staples said.

"I consider the advertisements for beds, sheets, pillows, girdles, intimate feminine articles and other such materials offensive.

"A picture of a lingerie model in a provocative pose is just as obscene as anything I ever saw from so-called panderers."

He said the law makes the recipient sole judge of the obscenity of an advertisement and demanded the junk mail be stopped. He sent copies of his letter to Schneeberger, to his congressman and senators.

Sen. Phillip A. Hart (D-Mich.) sent the complaint on to the Post Office Department.

Its general counsel, David A. Nelson, delivered the judgment.

"Mr. Staples is correct in the assertion that his determination of the erotically arousing or sexually provocative nature of an advertisement may not be questioned," Nelson said.

Wilber F. Lawrence, assistant general counsel, summed it all up.

"Most people gripe about junk mail but don't do anything about it," he said. "But under the law, they can declare that an ad for a sack of potatoes looks sexy to them. And if they do, we're obliged to act."

[redacted]

[redacted]

[redacted]

APPELLANTS' OPENING BRIEF

[redacted]

Joseph Taback,
Gray, Hirschman & Taback,
8500 Wilshire Boulevard,
Suite 703,
Beverly Hills, Calif. [redacted]
Attorneys for Appellants

[redacted] Law Printers, Los Angeles [redacted]

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IN THE

Supreme Court of the United States

October Term, 1969
No. 399

DANIEL ROWAN, dba AMERICAN BOOK SERVICE, *et al.*,
Appellants,

vs.

UNITED STATES POST OFFICE DEPARTMENT, *et al.*

APPELLANT'S OPENING BRIEF.

Reference to Reports.

The within case consisting of the opinions delivered in the court are as yet unreported.

Statement of Grounds of Jurisdiction.

The jurisdiction of this court is invoked upon the grounds that the case below involved the denial of a granting of an interlocutory injunction by a three-judge court and, further, a dismissal of the action below pursuant to Rules 56 and 12(b) of the Federal Rules of Civil Procedure. Authorization for direct appeal to this court is provided for in Title 28 U.S.C. Section 1253. The three Judge court was convened pursuant to Title 28 U.S.C., Section 2284.

The ruling and judgment in the case below was April 30, 1969 and the date of entry of said decision and judgment was April 30, 1969. Notice of Appeal was

filed within 60 days from the date of entry of said judgment and particularly done on May 28, 1969. The Notice of Appeal was filed in the United States District Court for the Central District of California. No rehearing date was requested nor granted.

A jurisdictional statement on behalf of the appellants herein was filed on the 28th day of July, 1969.

The within appeal was docketed in the Supreme Court of the United States on July 28, 1969 designated as No. 399 October term, 1969.

Probable jurisdiction was noted October 27, 1969.

Constitutional Amendments and Statutes.

First Amendment to the United States Constitution.

Congress shall make now law respecting an establishment of regligion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment to the United States Constitution.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Advertisements In The Mails. Prohibition of Pandering. Section 301 of Public Law 90-206 (codified as 39 U.S. Code, Section 4009).

(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postmaster General to refrain from further mailings of such materials to designated addresses thereof.

(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postmaster General shall issue an order, if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees.

(c) The order of the Postmaster General shall expressly prohibit the sender and his agents or assigns from making any further mailings to the designated addressees, effective on the thirtieth calendar day after receipt of the order. The order of the Postmaster General shall also direct the sender and his agents or assigns to delete immediately the names of the designated addresses from all mailing lists owned or controlled by the sender or his agents or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

(d) Whenever the Postmaster General believes that the sender or anyone acting on his behalf has violated or is violating the order given under this section, he shall serve upon the sender, by registered or certified mail, a complaint stating the reasons for his belief and request that any response thereto be filed in writing with the Postmaster General within fifteen days after the date of such service. If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a district court of the United States for an order directing compliance with such notice.

(e) Any district court of the United States within the jurisdiction of which any mail matter shall have been sent or received in violation of the order provided for by this section shall have jurisdiction, upon application by the Attorney General, to issue an order commanding compliance with such notice. Failure to observe such order may be punished by the court as contempt thereof.

(f) Receipt of mail matter thirty days or more after the effective date of the order provided for by this section shall create a rebuttable presumption that such mail was sent after such effective date.

(g) Upon request of any addressee, the order of the Postmaster General shall include the names of any of his minor children who have not attained their nineteenth birthday, and who reside with the addressee.

(h) The provisions of subchapter II of chapter 5 (relating to administrative procedure) and chapter 7 (relating to judicial review) of part I of title 5, United States Code, shall not apply to any provisions of this section.

(i) For the purposes of this section—

(1) mail matter, directed to a specific address covered in the order of the Postmaster General, without designation of a specific addressee thereon, shall be considered as addressed to the person named in the Postmaster General's order; and

(2) the term "children" includes natural children, stepchildren, adopted children, and children who are wards of or in custody of the addressee or who are living with such addressee in a regular parent-child relationship.

Added Pub.L. 90-206, Title III, § 301(a), Dec. 16, 1967, 81 Stat. 645.

The Rules of Practice 39 C. F. R. 956 are set forth in the appendix to this brief at page 30 through page 35.

The Questions Presented by the Appeal.

1. Is Section 301 of Public Law 90-206 (*Title 39 U.S.C. 4009*) unconstitutional?

2. Does *Section 301 of Public Law 90-206* (*39 U.S.C. Section 4009*) violate the First Amendment of the Constitution of the United States as an abridgement of appellants right of free speech and freedom of the press?

3. Does *Section 301 of Public Law 90-206 (39 U.S.C. Section 4009)* violate the Fifth Amendment of

the Constitution of the United States, in that it denies appellants due process of law?

4. Does *Section 301 of Public Law 90-206 (39 U.S.C. Section 4009)* violate the Constitution of the United States in that said statute is vague, ambiguous, standardless, and as applied to appellants an unlawful delegation of power?

5. Do the procedures available to appellants in connection with hearings provided for pursuant to *Section 301 of Public Law 90-206 (39 U.S.C. Section 4009)* violate the Fifth Amendment of the Constitution of the United States in that it denies appellants due process of law?

6. Are appellants entitled to injunctive relief enjoining the execution, implementation and administration of *Section 301 of Public Law 90-206 (39 U.S.C. Section 4009)*?

7. Is the denial of injunctive relief to appellants herein an abuse of discretion?

8. Are the Findings of Fact supported by the evidence herein?

9. Are the Conclusions of Law supported by the facts?

10. Inherent in Numbers 8 and 9 herein is the question whether the Appellants' action herein was properly dismissed pursuant to Rule 56 and 12(b) of the *Federal Rules of Procedure*.

11. Are the rules of practice (39 C.F.R. 956) in proceedings relative to violations under Title 39 U.S.C. 4009 unconstitutional in that they violate the Fifth Amendment of the Constitution of the United States?

Statement of the Case.

Appellants are publishers, advertisers, distributors, and are in the business of mailing services as well as operating mail order houses.

Section 301 of Public Law 90-206 (39 U.S.C. §4009) became effective as an act of Congress on the 15th day of April, 1968. It was a rider to the postal rates and salary statute. Appellants herein are directly and overtly effected by this legislation, its administration, enforcement and implementation. (A 17-38.)

Appellants herein received within six months of the enactment of 301 Public Law 90-206 between 7,000 and 10,000 Prohibitory Orders (A 17-38.) Prohibitory Orders are the first step embodied within that legislation. A Prohibitory Order pursuant to this legislation is issued by the Postmaster General to a mailer directing him and his agents or assigns to refrain from further mailings to a named addressee. A Prohibitory Order is issued upon the request of an addressee.

The Prohibitory Order expressly prohibits the sender and his agents or assigns from making any further mailings to the addressee effective on the thirtieth calendar day after receipt of the order. The order must also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents or assigns and, further, the Order must prohibit the sender or his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

The fact that appellants had received collectively between 7,000 and 10,000 Prohibitory Orders was sub-

stantiated by Affidavits filed in support of an action originated in the Court below. (A 17-38.) Said Affidavits were uncontroverted throughout the matter in the Court below. Plaintiffs and the government agreed virtually on the meaning of the statutes. (A 45, 46, 47, 48, 50, 51.) The Court below interpreted the statute differently. (A 58-79.)

Appellants originated an action upon a complaint and petition for declaratory relief to declare said public law unconstitutional in that it is violative of the United States Constitution and, namely, Article I, § 8, The First Amendment and Fifth Amendment thereto. (A 3-11.) Appellants asserted also that the law was an unlawful delegation of power, was ambiguous and also standardless, all in derogation of the Constitution of the United States (A 3-11.) Appellants sought an injunction pursuant to 28 U.S.C. 1253. (A 3-40.)

The issuance of a Prohibitory Order Pursuant to said statute is initiated by a recipient of mail, if in his sole discretion, he believes that pandering advertisements are erotically arousing or sexually provocative. Subsequent to the issuance of the Prohibitory Order, the Postmaster General, whenever he believes that such a sender or anyone acting on his behalf, has violated or is violating the Prohibitory Order, must serve upon the sender a complaint stating the reasons for his belief and request that any response thereto be filed in writing with the Postmaster General within fifteen days after the date of such service. Should such notification be joined by a sender, then a hearing, if requested, shall be set for the purposes of determining whether the Order given has been or is being violated.

The hearing that follows is conducted pursuant to rules of procedure contained in 39 C.F.R. part 956 (A 30-35.)

The Rules of Procedure do not permit the subpoena process, confrontation by complainant, nor is the procedure within the Administrative Procedure Act. (A 30-35.) The statute particularly exempts procedures contained therein from the Administrative Procedures Act. The regional counsel for the area serves as the hearing officer. (A 30-35.) The only evidence offered by the Government is the request for a Prohibitory Order and that, in fact, same has been directed to a party. Issues in question as concerning the constitutionality of procedures or substance are beyond the scope of the hearing officer. (A 24, 25.)

Once it is decided at such hearing that a party has violated the Prohibitory Order or that a party's agents or assigns have done so, the regional counsel requests of the Attorney General of the United States to give consideration to making application to a District Court of the United States for an order directing compliance with the above captioned Prohibitory Order.

Violation of an order of the District Court of the United States is punishable by contempt.

A three-judge court convened to hear the matter below dismissed appellants' complaint. (A 80.) It therefore concluded that Title 39 U.S.C., Section 4009 was not unconstitutional.

Summary of Argument.

I.

Section 301 of Public Law 90-206 (codified as 39 U.S.C. 4009) violates the Constitution of the United States in that it is an abridgement of the First Amendment thereto. The statute provides for a direct restraint and censorship upon freedom of expression, speech and press. It does this by vesting complete control of the flow of mail in individuals who may exercise that power upon a subjective determination all their own. Once an individual determines, within his sole discretion, that mail is erotically arousing or sexually provocative to himself, he may obtain a Prohibitory Order directed to the mailer which would cause that mailer to cease and desist from any further mailing of any kind whatsoever to this recipient. In addition, the mailer is further ordered by the Postmaster General to not mail to the recipient, any mail whatsoever, but also to cease and desist from transacting, selling, renting or exchanging any lists upon which the recipient's name is contained. This power vested in an individual, and supported and buttressed by federal governmental action, is a complete restraint and censorship upon freedom of speech and press. It has a chilling and inhibiting force upon free speech and press.

II.

The same action and power constitutes a violation of the Fifth Amendment of the Constitution in that it is a denial of due process of law. The Order, if violated, may be enforced ultimately by the District Court, and punished by contempt. No procedural standards of a

Constitutional calibre are provided for the administrative proceedings that purportedly are available to a mailer. In addition, the Court below contends that when the hearing procedure is called into effect, by the mailer, the Postmaster General clearly must review the Second mailing of the sender and measure it against the First mailing which initiated the Prohibitory Order in order to determine whether, in fact, a violation has occurred. This view of the Court below is contrary to the legislative history, committee reports and testimony given before the Senate Committee reviewing this legislation. Needless to say, if this were the situation then in fact there are no standards by which such a determination can be made, because in the first instance, the Prohibitory Order was obtained predicated upon a subjective view of a recipient. On the other hand, if the interpretation is as contended by Appellant, and as is supported by the plain meaning of the language together with the legislative history, and all additional indicia, then it merely means that a violation occurs upon the subsequent mailing of any type of material regardless of its substance or matter. Further, a violation would occur merely in the transaction or dealing with the list upon which the parties name may appear who had at some other time obtained a Prohibitory Order against such a mailer. Appellants urge that there is a denial of due process, both procedurally with regard to the hearing procedures, the imposition of the restraint and censorship aspects of the statute, as well as the manner by which the use of property is being curtailed by way of Federal legislation.

III.

Legislative history, the plain meaning of the statute, the committee reports, the testimony of the Attorney General of the United States, the General Counsel of Post Office Department, and other interested persons clearly indicate what the interpretation of the statute should be. The interpretation of the statute is consistent with that which Appellants argued in the Court below. The Court below stressed that if, in fact, Appellants were correct in their interpretation then, indeed, the government was in "Hot water". The Court then attempted to "shrink the loosely woven fabric of the statute down to Constitutional size." Appellants urge that a reading of all of the indicia upholds their interpretation of the statute and hence the statute must fall by its own language and weight.

IV.

Appellants argue that the statute is void because it involves an unlawful delegation or standardless delegation or is ambiguous. Further, Appellants urge that the statute is void for vagueness. There is no question but that if the power granted to the individual in subsections (a), (b) and (c) of the statute were granted to the Postmaster General, the delegation of power would run rampant. The problem is that no legality is acquired merely by granting this power to an individual, in the first instance due to the fact that subsequent to the Prohibitory Order the network of governmental machinery is put in motion that ultimately could lead its way to a citation for contempt against the mailer. One of the factors that makes this possible is the broad and standardless delegation of power to the individual to determine in his sole discretion that which is erotically arousing or sexually provocative.

Moreover, and even more fundamental to the defect, is that all subsequent mailings thereafter are made illegal and punishable through pressure by process or pain of contempt, all of which is predicated upon some standardless statute declaring certain written expression illegal by operation by reaction. Further, the illegality that occurs merely by virtue of dealing, renting, exchanging or transacting with lists has no guideline for illegality.

V.

The Court below and the government have argued and urged that commercial activity is ascribed a lower rung on the First Amendment "ladder" than other forms of speech. Indeed, there is an implication that, in fact, by virtue of the commercial aspects of the mail involved that it is not wrapped in the impervious paper of the First Amendment. Appellants argue that which has been repeated often which is namely freedom of expression, speech and press, does not lose its preferred status because it may be done under the auspices of commercialism. Appellants argue that in fact if this were the case, an advertisement for the sale of a Bible is capable of triggering off a violation of the statute, whereas, the offering for free of erotically arousing and sexually provocative material would fall beyond the purview of this statute. Needless to say, this would all be to the frustration of the purposes of Congress. Commercial activity cannot erode or corrode First Amendment guarantees and rights.

VI.

Throughout the case below and during aspects of the legislative history preceding this statute was the purported claim for the pitting of the First Amendment rights of free speech and press against a purported First Amendment right of privacy. The right of pri-

vacy is not in issue if the statute fails upon any of the preceding grounds.

Indeed if the statute is null and void then the conflict is manufactured. However assuming the analysis reaches this distance it is clear that a zone of privacy is not encroached upon nor is the matter so rooted in the traditions and conscience of our people as to be ranked as fundamental. In any event the right of free speech and press coupled with the fifth amendment rights involved must out-balance the right of privacy assuming it to be more than an amorphous concept.

VII.

The statute removes the hearing procedure from the Administrative Procedure Act. It further removes judicial review from the Administrative Procedure Act. It represents a step backwords in the administration of justice. In exempting same a statutory scheme has been devised to seriously trammel the rights of mailers.

VIII.

Since the court below upheld the statute against the challenge made below, lt therefore also denied appellants claim for an interlocutory injunction against the enforcement, implementation and administration of the statute. The court adopted its opinion as the findings of fact and conclusions of law. It dismissed the complaint of the appellants (plaintiffs below). It is clear that the uncontroverted affidavits of appellants demonstrating irreparable harm and multiplicity of litigation and the government's concurrence in appellants' interpretation of the statute still gave rise to an adverse ruling to appellants. This was only due to statutory construction. For all of the foregoing reasons the injunction should have issued.

ARGUMENT.

I.

Communication Via the Mails Is Protected Speech and Press Within the First Amendment of the Constitution of the United States and Therefore Enjoys Preferred Status.

The opposable thumb, the primate vertabrae, and the ability to communicate separates man from the entire animal kingdom. An attempt by organized society to alter the two former criteria would be unimaginable. The attempt to circumscribe and proscribe the third distinguishing feature because it involves the emotions and intelligence of man has been the basis for many arguments before this court.

The freedom to communicate orally and by the written word and, indeed, in every manner whatsoever is imperative to a free and sane society.

There are many avenues and arteries through which the dissemination and distribution of written materials flow. The postal system is certainly one of the more important media in this complex society. This artery becomes no more subject to sclerosis by control and censorship just because it is of governmental emanation than any of the other avenues through which we seek to communicate from human to human.

It is clear that the use of the mails for the dissemination and distribution of written materials is well within the zealous protection and guarantee against abridgement afforded by the First Amendment to the United States Constitution.

It seems important to reemphasize this tenet. A purpose is served, particularly if it serves to impede or

even slow down a rapid attempt to circumvent or circumscribe this basic truth of our law and sanity.

Justice Oliver Wendell Holmes stated in *Milwaukee Publishing Co. v. Burleson,* 255 U.S. 407, 437 that

> "The United States may give up the Post Office when it sees fit, but while it carries it on, the use of the mails is almost a part of free speech as the right to use our tongues . . ."

In the case of *Speiser v. Randall,* 357 U.S. 513, 518, the Court stated:

> ". . . It has been said that Congress may not by withdrawal of mailing privileges place limitations upon the freedom of speech which, if directly attempted, would be unconstitutional."

For the purposes of emphasis, may it be noted that this Court in the case of *Manuel Enterprises v. Day,* 370 U.S. 478, 504, through Jutice Brennan, taught,

> ". . . But at least it is arguably correct, and necessary, if we are to avoid the sections probable Constitutional infirmity (see *Near v. Minnesota,* 284 U.S. 697; *Summerfield v. Sunshine Book Company,* 95 U.S. Ap. C. 169, 221 F. 2d 42). *If construed as a provision allowing the Postmaster General to exclude all matters sent by a person who had previously sent violative matter* (emphasis added) such an exclusion by attaint could not be justified by the hoary dogma' . . . that the use of the mails is a privilege on which the government may impose such conditions as it chooses, (for that) has long since evaporated." *Roth v. United States,* 354 U.S. 476, 504 (dissenting opinion); *Hannigan v. Esquire, Inc.,* 327 U.S. 156; *Speiser v. Randall,* 357 U.S. 513, 518).

Freedom of speech and, press have been designated as the cornerstone of our society. It is within our judicial system that the marketplace of ideas has been given a foundation. Since this right has been given such preferred and critical status within our politico-social framework, its reemphasis must precede any and all argument in this matter.

This Court reaffirmed that the use of the mails is within the First Amendment in the case of *Lamont v. Postmaster General,* 381 U.S. 301. This Court stated at page 306 thereof, the following:

> "Here the Congress-expressly restrained by the First Amendment from 'abridging' freedom of speech and of press—is the actor. The Act sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail. Just as the licensing or taxing authorities in the *Lovell, Thomas,* and *Murdock* cases sought to control the flow of ideas to the public, so here Federal agencies regulate the flow of mail. We do not have here, any more than we had in *Hannigan v. Esquire, Inc.,* 327 U.S. 146, any question concerning the extent to which Congress may classify the mail and fix the charges for its carriage . . ."

Better histories and enunciations of this proposition indeed have been made prior to this Brief. However, it is against this framework and background that Appellant's case is presented.

Appellant's conduct and activity involve the use of the United States mails. It is the use by Appellants of this media that is brought in question by 301 Public

Law 90-206 (39 U.S.C. 4009). Appellants' conduct and use as it is prescribed and delimited by this statute is brought to this Court for its scrutiny and review within the context of the protection, insulation and significance of the First Amendment.

Appellants' absolute right to freedom of expression and communication as guaranteed by the First Amendment of the Constitution of the United States is placed in jeopardy by intrusion and partial annihilation due to this statute. The power of government or an individual through government to prevent or deter anyone from the free use of the mails flies in the face of the First Amendment and since the statute brought before this Court does this it is sufficient and adequate reason to declare it unconstitutional.

II.

The Prior Restraint, Prohibition and Censorship of Speech in 39 U.S.C. 4009 Causes It to Be Repugnant to the First Amendment of the Constitution.

Restraint and censorship permeate the entire text of this law. In Section (a) of the statute, the initial restraint and censorship is deposited with an addressee. The addressee may have a Prohibitory Order issued against a mailer such as Appellants. No discretion and no guideline are established for the issuing of the order by the Postmaster General, once he receives such a request from an addressee. The Order issues without a hearing. Only the sole discretion of the addressee that the advertising is erotically arousing or sexually provocative puts the force in motion which dictates to the Postmaster General that a prohibitory and injunctive mandate be issued to a malier or sender such as Appel-

lants. Herein lies a direct restraint which, if granted directly to the Postmaster General, would certainly fall before the First Amendment of the Constitution of the United States. Everyone is given the power to stand astride the mail.

In the case of *Walker v. Popenoe*, 149 F. 2d 511 (1945) where a Court addressed itself to the powers of the Postmaster General in dealing with purportedly obscene material in the flow of the mail enunciated in terms explicitly which emphasize the restraint and censorship power awarded to individuals under the aforesaid subsection in this matter. The Court in that case stated as follows:

> "In determining whether any publication is obscene, the Postmaster General necessarily passes on the question involving the fundamental liberties of a citizen, which is a judicial and not an executive function and must be exercised according to the idea of due process implicit in the Fifth Amendment. . . ."

The second aspect of restraint and censorship within this statute occurs in the delegation of power embodied in subsection (d). There the Postmaster General is empowered to decide whether a sender or anyone acting on his behalf has violated or is violating the Prohibitory Order mentioned in subsection (a) and if so to serve upon the sender a complaint. The complaint is to state the reasons for his belief.

The order upon which the complaint is predicated is made appropriate under subsection (c) of the statute. It provides all of the inhibitions and prohibitions that shall be embodied in the order. An example of such an order

upon which the decision set forth in Exhibit E attached to the affidavit of Lee Jay Winkler (A 22, 28, 29) is noted herein.[1]

The confrontation with the language in subsection (c) concerning the "making of any further mailings to the designated addressees" raises one of the most critical issues in this case. The ramifications are several and are as follows:

One interpretation of that language is that a sender who has been once prohibited from mailing can mail no other material whatsoever to an addressee. Support for this interpretation is manifestly clear. The government urged in the Court below that in fact this was the interpretation to be given to the statute at hand. (A 45-51.) Indeed, it is in accord with the intention of the authors of the Law and Amendment and other members of the House of Representatives.[2]

If in fact this is the interpretation, then it is respectfully submitted that the statute is patently fatal in its construction. This would place a prohibition, restraint and chill on any type of communication via the mail once a sender has been the subject of a Prohibitory Order regardless of the content of the materials which he would subsequently mail.

Appellants respectfully submit that in view of the position taken by the author of the Bill, as well as the government in the Court below, that no other interpretation can be given to this statute and hence it must be stricken as being in derrogation of the First Amendment to the Constitution of the United States.

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[1]Attached as Exhibit A hereto.

[2]The Congressional Record, 90th Congress, First Session, H. 13265, 6 (October 11, 1967).

The Court below via their opinions interpret subsection (d) of the statute as meaning "similar materials" rather than any mailings whatsoever. It is contended therein that after the first mailing that all other mailings an be measured by the objectionable material of such first mailing. It is stated and reasoned that the determination by the Postmaster General to issue a complaint because of "such mailings" is done by measuring a second mailing in terms of the first. The court below urges additionally that this is of no import or impact because no sanction is levied as a result of the complaint issued under subsection (d).

Appellants urge that the power vested in the Postmaster General to determine whether mailings subsequent to the issuance of a Prohibitory Order are similar in nature or even such other mailings which initially arose in the mind of someone other than the Postmaster General. (and which is a prelude to further actions in the United States District Court) is of such a chilling inhibition upon a sender's First Amendment rights that it cannot be overlooked or minimized. At this point, following the issuance of the prohibitory order a sender or disseminator must determine, discern, review, determine and screen what is "such other mail" or by what standard the various postmasters throughout the United States will make their determination, as they sit astride the mail. Here the element of prior censorship, self censorship and restraint is introduced and intrudes regardless of whether there be penalty immediately, directly, or in futuro so as to make the statute unconstitutional in its abridgement of First Amendment guarantees.

Assuming for purposes of argument that the term "pandering advertisement" has been adequately and unambiguously defined in the statute, it is clear that it is not pandering advertisements *per se* that are within the purview of this legislation, but rather pandering advertisements which a recipient in his sole discretion deems erotically arousing or sexually provocative. The coalition of factors must exist. The Postmaster issues upon his belief what someone else believes, in his sole discretion, to be an erotically arousing or sexually provocative pandering advertisement. That such a situation can only create an inhibiting and chilling factor upon persons using the mail seems to be abundantly clear.

As a somewhat collateral issue, it may be appropriate to inquire rhetorically what the recipient's rights would be if he disagreed with the Postmaster General's belief that the second mailing was similar to the first mailing. It comes to mind that the recipient might then have to do an affirmative act to re-obtain that mail or other mail which he personally does not believe to be erotically arousing or sexually provocative just as the Appellant Lamont had to do under the former 39 U.S.C. 4008 previously declared unconstitutional in *Lamont v. Postmaster General,* 381 U.S. 301 (1965).

The restraint and chilling effect imposed at this juncture is by the United States Post Office. It is governmental action. The Post office, with its numerous postmasters each administering the law by way of their beliefs as to what is similar to previous mailings and which have been personally determined as erotically arousing and sexually provocative mail by a myriad of recipients.

In addition subsection(c) of the statute clearly indicates that the initial Prohibitory Order must direct the sender and his agents or assigns to delete immediately the names of a requesting addressee from all mailing lists owned or controlled by the sender or his agents or assigns and, further, the Order must prohibit the sender or his agents or assigns from selling, renting, exchanging or transacting lists bearing the names of requesting addressees.

The requirement that the foregoing be contained in the Order is without regard to the nature of the lists or the purposes for which such other lists may be used. The requirement does not discuss whether these lists must involve similar material as that which gave rise to the issuance of the Order.

The plain language of the statute would therefore seem to give credence to the appellants and the first interpretation of the statute. That interpretation was *any further mailings whatsoever are,* in fact, prohibited. In addition, it becomes clear that whatever interpretation is adopted, these additional prohibitions concerning the lists that are to be included within the initial Order serve as a prior restraint and censorship upon senders. No regard is given to the purpose or nature of mail arising out of these other lists.

Further, Subsection (f) provides that receipt of mail matter 30 days or more after the effective date of the Order provided for by the section shall create a rebuttable presumption that such mail was sent after such effective date. No descriptive or modifying words concerning "mail matter" are to be found in that section. Rather, the broad term connotes and indicates that it is

mail matter of any kind whatsoever which is proscribed by any of the preceding subsections.

Attention must also be drawn to the fact that innocence or willfullness is not made a necessary ingredient by this statute. Indeed, if one innocently makes a subsequent mailing under either one of the interpretations (that is "any mail whatsoever" or "similar mail") he has violated the Prohibitory Order. Keeping this well in mind, a censorship imperative whether self or external is created as to all outgoing mail by a sender. There is no escape or protection by virtue of the fact that he may be innocent in his conduct and that through no fault of his own subsequent prohibited mail has been sent. Once the act is done, the processes of the law are put into effect and the undue burdens and hardships of involving oneself in litigation become the price or punishment awaiting the sender. The law should therefore be declared unconstitutional.

Near v. Minnesota, 284 U.S. 697;
Freedman v. Maryland, 380 U.S. 552.

III.

The Statutory History, Including Committee Reports and Statements of Committee Members and Sponsors of Legislation, Support the Interpretation That Is Ascribed to the Statute by Appellants.

The language in the statute is most determinative of its interpretation.

Schwegmann Brothers, Calvert Distillers Corp., 341 U.S. 384, 390-5;
United States v. Oregon, 366 U.S. 643, 648.

The Court will also look, and has looked at all indicia in order to determine the legislative intent. *United States*

v. American Trucking Association, 310 U.S. 534, 542-544; *United States v. Dickerson,* 310 U.S. 554, 562; *Commissioner v. Estate of Bosch,* 387 U.S. 456, 563.

The importance of committee reports and statements of committee members or sponsors of legislation cannot be over emphasized as same as developed in the interpretation of statutes before this court. That this is another factor in the consideration of interpretation of the statutes has long since been established. *Wright v. Vinton Branch Bank,* 310 U.S. 440, 463-464; *United States v. United Mine Workers,* 330 U.S. 258, 278-280; *National Woodwork Manufacturers Assn. v. Labor Board,* 386 U.S. 610, 639-640.

The statute here in question was designed, to proscribe and prohibit any and all further mailing subsequent to an initial Prohibitory Order by the sender to the complaining addressee. Further, it is clear that the purpose and intent of this legislation was to place a prohibition upon the rental, selling, and transferring of lists containing the names of individuals who have obtained Prohibitory Orders. It is clear from all of the aforementioned indicia, that it is the individual citizen who is intended to be made the sole judge of whether an advertisement he receives is a pandering advertisement once he does this he unleashes the power of the federal government to enforce his views.

In fact, the legislative history indicates that a former House Committee Bill required the Postmaster General to decide what was or what was not pandering under the definition contained in the Bill. It was on the floor of the House, that another representative offered an amendment which was adopted and ultimately embodied in the present statute that provided that this

determination shall be made solely by the mail recipient. According to the legislative history, this had the effect of taking the Postmaster General out of the role of censor.[3]

All of this being the case, it clearly establishes that the interpretation given to the statute by Appellants is the correct interpretation and, therefore, for the foregoing reasons, the statute must fail because of its constitutional infirmities. The legislative history clearly states

> ". . . The Postmaster General is then required to issue an order to the sender directing him to refrain from sending *any further mailings of any kind to such person.*" (emphasis added).

The legislative history further points out that

> "if a sender continues to send mail to a person in violation of the order issued by the Postmaster General, an order may be obtained from an appropriate federal District Court, upon application by the Attorney General, for a court order commanding compliance with the provisions of this Title. A failure to observe this court order may be punished by the court as contempt."

There is no question but that from the legislative history it is discerned that mere subsequent mailing of sufficient, regardless of content or desire or innocense or willfulness, to constitute a violation of any order.[4]

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[3]U.S. Code and Congressional and Administrative News, 90th Congress, First Session, 1967 Legislative History, pages 2294-95. Ninetieth Congress. First Session on H.R. 7977, page 525.

[4]U.S. Code and Congressional and Administrative News, Ninetieth Congress, First Session, 1967 Legislative History 2294-95.

The report of the committee on Post Office and Civil Service matters further emphasis the point when in their report they state

> ". . . The mailer is prohibited not only from sending advertisements to the proscribed name but from sending any mail matter of any class or kind."

The same report indicates that the word "assigns" in subsection (c) of the statute means business successors.[5]

Former Attorney General Ramsey Clark, on behalf of the United States Department of Justice on May 29, 1967 directed a statement to the chairman of the Committee on Post Office and Civil Service Affairs of the House of Representatives.[6] The United States Department of Justice urged that this legislation not be passed because in its opinion the law was unconstitutional as appellants herein claim.

Quoting former Attorney General, Ramsey Clark, in his opposition to the passage of the statute, appellants note:

> ". . . Any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutionality. *Bantam Books v. Sullivan,* 372 U.S. 58, 70 (1963)."

It was the absolute intention of the author of this Bill to absolutely impede and restrain the transferring

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[5](Report of Committee on Post Office and Civil Service Matters, First Session of the 90th Congress, Senate, Report No. 801, at page 39.)

[6](Report of the Committee on Post Office and Civil Service Affairs, the House of Representatives, together with individual and minority views, the First Session, 90th Congress, Report No. 722, pages 71-73.)

of lists of names or the trafficking with same regardless of intent or subsequent mail content. The Congressman first sponsoring this Bill makes that clear in his testimony.[7]

The testimony of Timothy May, then General Counsel for the United States Post Office, testified that the addressee is not given the option of stopping a particular kind of mail but that he can only have a mailer directed to make no further mailings whatsoever.[8]
Further, Mr. May stated:

> ". . . As an addressee, I would be empowered to determine that all 'occupant' mail, soap advertisements, bills from creditors, income tax forms, even a letter from my Congressman, were pandering advertisements, and could prohibit any further mailings from such mailers on pain of contempt of court.
>
> "Needless to say, widespread use of these powers could plunge the postal system into chaos, and most certainly destroy the mail advertising industry. In short, I believe Title III to be impractical and an unnecessary means of dealing with the problem that concerns us all."

A statement of the Assistant Attorney General, Office of Legal Counsel, Dept. of Justice, is further submitted. It too calls the constitutionality of the proposed act into question and indicates that it goes beyond the

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[7](Hearings Before the Committee on Post Office and Civil Service, United States Senate, Ninetieth Congress, First Session, on H.R. 7977, pages 513 through 525).

[8](Hearings Before the Committee on Post Office and Civil Service, United States Senate, Ninetieth Congress, First Session, on H.R. 7977, page 545).

scope of constitutional guarantees. It further substantiates that there is no question that once a Prohibitory Order is obtained no further mail may be disseminated by a mailer.[9]

The American Book Publishers Council urged against the passage of this Bill.[10]

The Magazine Publishers Association opposed the passage of the Bill and understood its interpretation consistent with that which the Appellants have contended from the very inception.[11] Joining the list of the groups that opposed the passage of this Bill was also the American Library Association.[12]

The Congressman who is responsible for the significant amendment to the original Bill testified before the Senate Committee in part as follows:

> "The absolute determination to state to the Post Office Department, 'I don't like this material because it is in my view erotically arousing or sexually arousing.' "

The Chairman then asked,

> "You don't have to make any case whatsoever?"

The Congressman replied,

> "None whatsoever. If he is hung up on cabbage, he can prevent the weekly market circular from

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[9](Hearings Before the Committee on Post Office and Civil Service, United States Senate, Ninetieth Congress, First Session, on H.R. 7977, pages 566-577).

[10](Hearings Before the Committee on Post Office and Civil Service, United States Senate, Ninetieth Congress, First Session, on H.R. 7977, pages 577-582).

[11](Hearings Before the Committee on Post Office and Civil Service, United States Senate, Ninetieth Congress, First Session, on H.R. 7977, pages 627-629).

[12](Hearings Before the Committee on Post Office and Civil Service, United States Senate, Ninetieth Congress, First Session, on H.R. 7977, page 631).

coming in his house if he is willing to say that cabbage has caused him to become sexually aroused."

The Chairman then asked:

"This would reach, then, the prohibition of any mailing list if he states that he does not wish this to come into his house since he is the sole judge on the prohibition of any type of literature that he does not wish to come in?"

The Congressman replied: "Precisely." The Congressman went on further to say:

"If he (recipient) is willing to say that the automobile circular that comes to his house is objectionable because it is sexually arousing to him, he can prevent receiving the advertisement of the Buick. Maybe he is hung up on it. I don't know, and I don't care, is my point."

Further, the testimony of this co-sponsor of the Bill indicates the trafficking, dealing, selling, renting or exchanging of lists with names of persons who have sought Prohibitory Orders was designed to be defeated under the terms of this Bill.[13]

No other interpretation other than that which has been contended by the Appellant as to the interpretation and plain meaning of the statute would seem to be warranted against this background and language of the statute. It is submitted that because of this interpretation and because of what the statute intends to do, it must fail, both as a violation of the First Amendment and Fifth Amendment of the Constitution of the United States.

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[13](Hearings Before the Committee on Post Office and Civil Service, United States Senate, Ninetieth Congress, First Session, on H.R. 7977, pages 517, 525-534; 530, 531).

IV.

Section 301 of Public Law 90-206 (39 U.S.C. Section 4009) Violates the Fifth Amendment of the Constitution of the United States in That It Denies Due Process of Law.

The Statute here in question deposits rights to addressees, postmasters and courts. The rights, the granting of these rights and the exercise thereof are in violation of the Fifth Amendment of the Constitution. Both on its face and as applied to appellants herein the statute is in derogation of the Fifth Amendment.

Turning to the initial phase under the statute, it is clear that an addressee has an absolute right to obtain injunctive relief against a mailer without benefit of any type of hearing. The Postmaster General has no discretion as to the issuance of the initial Prohibitory Order once he receives a request from an addressee. 39 U.S. Code 4009(d) states ". . . The Postmaster General *shall* issue an Order if requested by the addressee . . ." (emphasis added). The statute in question grants to an individual addressee that which it could not grant to the Postmaster General. *Walker v. Popenoe,* 149 F. 2d 511 (1945) spoke to the issue. In that case, involving purportedly obscene materials the Court enunciated as follows:

> "In determining whether any publication is obscene, the Postmaster General necessarily passes on the question involving the fundamental liberties of a citizen, which is a judicial and not an executive function and must be exercised according to the idea of due process implicit in the Fifth Amendment."
>
> Page 513. "Appellants Order barring the pamphlet from the mails was issued without notice or

hearing. The trial court held, and we agree, that the Order was for that reason a denial of due process. Our views on this point are expressed in Judge Arnold's opinion in which, as in the present opinion, we all concur. But if the judgment were affirmed solely on this ground, the merits would have to be decided at a future hearing and at a future law suit. To obviate that necessity, we are deciding the merits now. The pamphlet is not covered by the statute. Since a contrary finding could not be supported, it is immaterial that the trial court made no finding. The result is that the judgment is affirmed on two distinct and independent grounds. If both these grounds were absent, we should have to consider whether Congress may constitutionally confine discussion of sex as it could not confine discussion of other subjects within the limits which it conceives to be good for the community."

At page 513, Justice Arnold stated the following:

". . . *The power to exclude a publication from the mails without a hearing in practical effect permits the Postmaster General to cause irreparable injury to any publisher without the minimum safeguard of an opportunity to present his case.* (emphasis added) There are, of course, other means of distribution besides the mails, but they are not effective ones in the case of ordinary publications. To deprive a publisher of the use of the mails is like preventing a seller of goods from using the principal highway which connects him with his market. In making the determination whether any publication is obscene, the Postmaster General necessarily passes on a question involving the fundamental liberty of the

citizen. This is a judicial and not an executive function. It must be exercised according the ideas of due process implicit in the Fifth Amendment. As we said in the case of *Pike v. Walker,* 121 Fed(2d) 37, 39: 'Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social and personal affairs of the people are conducted and upon which depends a greater degree than upon any other activity of government, the promotion of the general welfare.' Not only this, but the postal system has a monopoly which the government enforces through penal statutes forbidding the carrying of letters by other means. It would be going a long way, therefore, to say that in the management of the Post Office the people have no definite rights reserved by the First and Fifth Amendments of the Constitution, and if they have, it would follow that in administering the laws established to protect the mail and the regulations thereunder, the duty of the Postmaster General would become to use the language of Justice Brandeis in the *Burleson* case, *supra,* 255 U.S. 407, that:

> 'In making the determination he must, like a Court or jury, form a judgment whether certain conditions prescribed by Congress exist, uncontroverted facts or by applying the law. The function is strictly a judicial one, although exercised in administering an executive office. And it is not a function which either involves or permits the exercise of discretionary power—which is to say, that his authority is governed by Acts of Congress which confer it and by the law of the land.' "

Appellants argue that the right to issue and obtain the initial Prohibitory Order flies in the face of the Constitution and that the foregoing case supports this proposition.

Passing from the initial stage of procuring the Prohibitory Order, this statute vitiates Fifth Amendment guarantees in its second phase. This occurs when the Postmaster General rules upon the complaint he issued either because there has been a second mailing or because he, of any kind whatsoever in his belief, determined that such second mailing is similar to that which was personally found to be erotically arousing or sexually provocative to some other person.

The statute in granting this power places the Postmaster General astride the mails and undermines the protection of the due process clause of the Fifth Amendment of the Constitution of the United States.

Appellants respectfully submit that it is not sufficient that the United States District Court will finally determine whether any subsequent mailings are violative of Orders authorized under the statute. On the one hand, if the U.S. District Court's review is limited to the question of whether there has been a subsequent mailing of any kind whatsoever, then indeed the court serves as a rubber stamp for the complaint of the Postmaster General which is defective for the reasons heretofore stated. On the other hand, if the review by the U.S. District Court is for the purposes of determining whether subsequent mailings by a sender are similar to the mail which the addressee found within his sole discretion to be erotically arousing or sexually provocative (aside from the question of what process and standards are employed in making this determination) a prohibition

and illegality are being sought to be pronounced upon the materials which are not otherwise illegal Governmental action of the most direct kind is here interjected.

Additionally, it is noted that subsection (h) provides that Chapter 5 relating to administrative procedure and chapter 7 relating to judicial review of subchapter 2, part 1 of Title 5 of the United States Code, do not apply to the provisions of this section. By direct excision of this statute from the Administrative Procedures Act and particularly by virtue of the exemption of judicial review, serious question are raised not only as to the function of the United States District Court but also under the Fifth Amendment.

Appellants also urge that the attempt to ascribe a definition to pandering advertisement is not enough to resolve the function of the Postmaster General at the issuing stage of the complaint or the functioning of the U.S. District Court when a compliance order is being sought. A clear reading of the statute under the lower court's view would require a coalition of a pandering advertisement and the complete subjective factors of the initial recipient to establish the measuring standard. It is urged by the Appellants that, there can never be a coalition of these factors under the circumstances in the law as interpreted below.

It is clear also from all of the foregoing that the transacting, selling and transferring of lists are prohibited by virtue of the language and intent of this statute. This was the desired intent and it was achieved by virtue of this law. The appellants submit that this is a denial of property, and the handling of same and is as much an act or mode of doing business as are the goods of merchants doing business in a retail store.

Argument and discussion as same pertains to the actual procedures and the enforcement of this statute will be made in this Brief, *infra*. Notwithstanding the forthcoming objections and argument, it is submitted that the statute for the foregoing reasons is an absolute abridgement of the rights guaranteed to individuals under the Fifth Amendment of the Constitution of the United States. Predicated upon this reason alone, the statute should be declared unconstitutional.

V.

39 U.S.C. Section 4009 Violates the Constitution of the United States in That Said Statute Is Vague, Ambiguous, Standardless and an Unlawful Delegation of Power on Its Face and As Applied to Appellants.

Appellants urge that the ambiguity between section (a) and sections (b) and (c) of the statute can at best only be described as creating an unworkable and unconstitutional conflict within the statute itself. Based upon this infirmity the statute must fail.

A clear reading of the statute points up the fact that an addressee is vested with the sole discretion in determining upon what basis the judicial function of the issuance of a Prohibitory Order shall occur. There are no guidelines or standards by which this unfettered exercise of discretion is to be limited. It does not call for an objective determination or uniform determination, but rather a subjective conclusion by each member of a vast population.

Even more substantially and critically is that it cannot be ascertained with constitutional certainty by what standard the Postmaster General or even the United States District Court functions subsequently.

The two interpretations previously discussed which are namely, that (a) a subsequent mailing to a Prohibitory Order is *per se* a violation, or (b) it is only when similar material are mailed (*i.e.*, similar to that which gave rise to the initial Prohibitory Order) constitute an unlawful delegation of power or a standardless delegation of power to the Postmaster General and District Court of the United States. It cannot be ascertained from a reading of the statute what the standards are by which the complaint and compliance order, each in their turn, are to be issued.

Both opinions of the court below finds a standard after the first mailing has occurred and urges that other proposed mailings are to be measured by the objectionable material of such first mailing. Absent the identical mailing piece in the second submission through the mail, it is quickly questioned how the measurement operates. Since the sole discretion of an individual acting within the framework of himself in determining that an item of mail is erotically arousing or sexually provocative is necessary and the regulating authority does not have benefit of his thoughts as they relate to the subsequent mail, the measurement cannot be made by any standard.

The delegation of this judicial function carries no criteria or standard for the Postmaster General. The lower court seeks to shrink the otherwise loosely woven fabric of the statute to create a constitutional structure from which the statute may be applied and enforced.

The statute is void for vagueness. Due to the standardless delegation of power, this deposit of power is unlawful. Due to the ambiguous language which require tortuous judicial interpretation for salvage the statute

is void. A statute imbued with all of these infirmities which seeks to regulate communication and expression cannot and should not survive in a society of law.

The infirmities within the statute are not cured because contempt for violation of an order cannot occur until the order of the Postmaster General is reaffirmed or pronounced by a United States District Court. The fact that the statute can cause an individual to be brought before the United States District Court after he has been funneled through the purported administrative procedure involved herein is an unconstitutional burden. The fact that he once again appear before the United States District Court for violation of the District Court's order is hardly a situation which is cured by asserting that there is no danger of any penalty until subsequent conduct contrary to the order of the United States District Court has occurred. An expensive human price is being asked to be paid by a statute which can "only be salvaged by meticulously construing its provisions to shrink its loosely woven fabric to constitutional size."[14]

It is patently clear that the law of the land declares Congressional enactments which are vague or standardless, repugnant to the Constitution and have consistently struck them down. *Winters v. New York,* 333 U.S. 507; *Giacco v. Pennsylvania,* 382 U.S. 399; *Arizona v. California,* 373 U.S. 546, 625, 626; *Schecter Poultry Corp. v. United States,* 295 U.S. 495; *Panama Refining Company v. Ryan,* 293 U.S. 388. Indeed, the statute herein purports to repose in the addressee or the Postmaster General all of the powers of the three branches

[14]Appendix p. 69 Circuit Judge Hufstedler concurring Opinion.

of this Federal government almost wholly unfettered. The words of Justice Cardozo in his concurring opinion in *Schecter Poultry Corp. v. United States,* 295 U.S. 495, reverberate the hollow shell of this statute wherein he described the NRA Code as "a delegation running riot."

Justice Harlan, in the case of *Arizona v. California,* 373 U.S. 546, 626, stated:

> ". . . The principal that authority granted by the legislature must be limited by adequate standards serves two primary functions vital to preserving the separation of powers required by the Constitution. First, it inures that the fundamental policy decisions in our society will be made not by an appointed official, but by the body immediately responsible to the people. *Second,* it prevents judicial review from becoming merely an exercise at large by providing the Courts with some measure against which to judge the official action that has been challenged."

The case of *Carter v. Carter Coal Company,* 298 U.S. 309, 311, reiterates the sentiment and law applicable to this situation:

> "The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. The record shows that the conditions of competition differ among the various localities . . ."

". . . And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty in private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to a decision of this Court which forecloses the question. A.L.A. Schecter Poultry Corp v. United States, 295 U.S., page 537. . . ."

The proposition cannot be stated more eloquently by this writer.

Solace and superficial strength is attempted to be garnered from the case of *Ginsburg v. United States,* 383 U.S. 463 on the baseless grounds that pandering advertisements were defined and hence a standard created. This is not true. Indeed one is impressed by the review for standards in making a determination as is evidenced in the *Ginsburg* case. The admonitions concerning pandering statutes and their definiteness was made known in that case.

VI.

The Procedures Provided for in Connection With the Statute Cause the Statute to Violate the First and Fifth Amendments and in Themselves Are so Violative.

Attached to the affidavit of Lee J. Winkler as an exhibit thereto and marked Exhibit "F" (A 30-35) are the rules of practice and proceedings relative to violations under 39 U.S. Code 4009. Rules are found at 39 C.F.R. part 956. These rules are made applicable to administrative hearings requested pursuant to 39 U.S.

Code 4009(d). At the time of the argument in the court below, several of the appellants herein, including Lee J. Winkler, dba Quality Products, had been involved in hearings pursuant to the aforesaid section.

As brought to the attention of the court below both in writing and orally, appellants involved in those hearings are subjected to the following:

1. There is no right to subpena witnesses or complainants;

2. The regional counsel of the Post Office Department is the hearing officer;

3. The taking of depositions are circumscribed and can only be had upon permission of the hearing officer;

4. The party seeking to take a deposition is to pay all fees required to be paid to a witness and the deposition officer (which cannot be ascertained from the reading of any document);

5. The proceeding is not adversary in nature;

6. A finding and determination under these rules is capable of being supported entirely by hearsay, and the right to cross-examination is made meaningless under the procedures;

7. There is no definite time limitation as to when a matter must be brought to hearing, but rather vague reference to "whenever practicable, the hearing date will be within 30 days from date of the notice of hearing served on the mailer;"

8. No provision for findings of fact or conclusions of law are made necessary.

Several conclusions can be drawn from a reading of these procedures. The first of such conclusions is that

the statutory scheme embodied in 39 U.S.C. 4009 was enacted to clearly eradicate and eliminate materials and mailers which some people find offensive because they may deal with sex or they may believe they deal with sex. The law in its language as has been urged, *supra,* and in its legislative history and intent, makes this clear. In addition the exemption of the hearing procedure and the law itself from the administrative procedure act and to the procedures concerning judicial review relative to administrative proceedings, is an aid to that statutory scheme of complete censorship, restraint and attempt at ultimate control of certain facets or types of communication.

Winkler was involved in a hearing growing out of 39 U.S.C. 4009(d). A decision emanating from that hearing is attached to his affidavit and marked Exhibit "E". (A28-29.) At that hearing originally all of the objections as set forth hereinabove were raised. All of the objections were overruled. Indeed, there was no question in the hearing officer's mind that all that was necessary to establish a violation of the order was merely to show a subsequent mailing of any type of material. It was even brought to the attention of the hearing officer that two different mailing lists were involved, but it was quickly pointed out by the hearing officer that the statute covered the rental of lists and transacting therewith.

The American Bar Association, upon the recommendation of the Postal Matters Committee, the Administrative Law Section, the Board of Governors and the American Bar Association House of Delegates approved the resolution which in word, substance and effect requested the non-passage of this law or an iden-

tical law, because of its abridgement of First Amendment and Fifth Amendment rights.[15]

Quoting from a part of that testimony,

> ". . . The American Bar Association regards this exception to usual APA requirements as an unfortunate setback or retrogression in the progressive evolution of administrative law. The Attorney General heretofore has shared this view, and we understand that he continues to do so. The courts have held that APA guarantees are applicable to POD administragive obscenity proceedings. *Door v. Donaldson,* 90 App. DC 188, 195 Fed.2d, 764, (1952); *Walker v. Popenoe,* 80 App. DC 129 (1945). Absent an express statutory exclusion, I have no doubt the courts would continue to hold the APA applicable to POD administrative obscenity proceedings as to other POD proceedings required by statute. The American Bar Association opposes the enactment of legislation which would deny a litigant Administrative Procedure Act protections, however worthy the cause which might lead to such denial."
>
> The hearings granted herein are technical and not substantive. When dealing with one's right to free speech and to the free distribution of ideas and material, such abridgement or intrusions should not occur except by substantive determination pursuant to law permitting due process."

Parenthetically it is interesting to note that the remainder of the testimony mentioned herein clearly re-

[15](Hearings Before the Committee on Post Office and Civil Service, United States Senate, Ninetieth Congress, First Session, on H.R. 7977, pages 593-599).

peats the interpretation of the statute before the Senate Committee which was argued by the appellants in this matter in the lower court.

In the case of *Freedman v. State of Maryland,* 380 U.S. 52 (1965) this court in reviewing a censorship statute stressed the necessity for procedural safeguards within a statutory scheme seeking to impose restraint or censorship on expression. As stated there and applicable here, had Congress intended to do same "a model is not lacking."

The statute with its appurtenant procedures are insidious to First and Fifth Amendment rights guaranteed by the Constitution of the United States and the statute should be stricken.

VII.

Commercial Activity in No Way Removes the Protection and Guarantees Afforded by the First Amendment.

The opinion below urged that commercial advertising or commercial activity is not afforded the same protection within the First Amendment of the Constitution as other items of expression, speech or press.

Ginsburg v. United States, 383 U.S. 463, 474, recited,

> ". . . No weight is ascribed to the fact that petitioners have profited from the sale of publications which we have assumed but do not hold cannot themselves be adjudged obscene in the abstract; the sanctioned consideration of this fact might indeed induce self censorship, and offend the frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of

expression secured by the First Amendment. (See *New York Times v. Sullivan,* 376 U.S. 254, 265-266; *Smith v. California,* 361 U.S. 147, 150). . . ."

In *Smith v. California,* 361 U.S. 147, 150, the Court in speaking of free publication and dissemination of books and other forms of the printed word, said

". . . It is of course no matter that dissemination takes place under commercial auspices. See *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 195; *Grosjean v. American Press Co.,* 297 U.S. 233. Certainly a retail book seller plays a most significant role in the process of the distribution of books."

It is submitted that *Valentine v. Chrestensen,* 316 U.S. 52, is peculiar unto itself, and has no application to the situation at hand. Indeed, not a single authority is embodied within that case and further, the facts are unique within the framework of that case and readily distinguishable from the matter at hand.

Comfort is sought to be gained from *Ginsburg v. United States, supra,* wherein one of the notes thereto states,

"material sold solely to produce sexual arousal, like commercial advertising, does not escape regulation because it has been dressed up as speech. . . ."[16]

It is almost unnecessary to state the view taken in *Ginsburg v. United States* and what, in fact, was held and meant. If speech and expression falls outside of the First Amendment to the Constitution as the majority of this court holds with regard to certain forms of speech, then it is not protected with the force and ef-

[16]*Ginsburg v. United States,* 383 U.S. 463, 475, n. 17.

fect of the Constitution, but if the speech is not unlawful, such as the expressions and materials involved in this case, then the full comfort and protection of the First Amendment is afforded to it whether it seeks to convert or sell the receipient.

Holding contrary to the foregoing would indeed frustrate the purpose of Congress. It would mean that the offering to give away materials which are sexually provocative or erotically arousing fall outside the purview of this statute and the offering to sell, for example, Theodore Dreiser's, American Tragedy, is within the condemnation of this statute. It is respectfully submitted that this is far too tenuous a distinction upon which to tamper with the freedom of expression, speech and press. The statute cannot be given continuous life predicated on the alleged unconstitutionality of commercialism.

VIII.

The Right of Privacy Is Not Involved.

In the court below and within sone of the events going to make up the total Congressional history of this statute was a concept that a polarity had been created between the First Amendment guarantee of free speech and a purported First Amendment right known as privacy. A pitting of right against right was created in these various events. The contrived confrontation of alleged constitutional imperatives was thus made into the proverbial irresistable force coming into contact with the immovable object.

Argument and discussion has centered around which right is the greater. One judge in the court below argued that indeed there was only an amorphous right such as

the right of privacy contained within the First Amendment.

Appellants submit that a determination of the issues involved herein do not require a determination of whether there is such a right of privacy embodied within the First Amendment. Also that no determination is necessary if, indeed, it does exist, as to which of the rights is greater or which must give way. Appellants contend that the statute is fatally defective for all of the heretofore given reasons. Hence it would follow that the determination concerning right of privacy does not come into play, at least on this day.

If the statute is defective for any of the foregoing reasons, then and in that event, it would fall regardless of whether the right of privacy is a protectible interest within the First Amendment of the Constitution or any other portion of the Constitution.

Assuming for purposes of argument, however, that in some way the analysis reaches the concepts of free speech and right of privacy, appellants reason as follows:

That the right of privacy is an amorphous concept, if not an anomalous concept, within the Constitution of the United States.

The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive and the right to read. *Griswold v. State of Connecticut,* 381 U.S. 479. *Stanley v. Georgia,* 89 Supreme Court 1243 (1969).

> "It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom [of speech and press] . . . neces-

> sarily protects the right to receive . . .!" " . . . This right to receive information and ideas, regardless of their social worth . . ., is fundamental to our free society."

Both of these cases cite the well known line of cases involved in the very area in which Appellants find themselves.

Free speech and press, indeed, all forms of expression, would virtually become worthless unless there were someone with whom to communicate. This is the matrix of a civilized and ordered society.

The statement or concept that the right of privacy can subvert and thwart these constitutional imperatives is an enigma to our philosophy.

It does seem that if the view is adopted that, in fact, right of privacy is not embodied in the Constitution, then the discussion would be at an end. On the other hand, if the view is adopted that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance and that various guarantees create zones of privacy, it is submitted that that which is being done by Appellants does not vitiate the penumbra or invade a zone of privacy created.

The recipients are not captives. They are not exposed to the blaring of sound trucks and horns which permeate the walls of their homes. They are not confronted by the foot in the door salesman who will not take no for an answer or subjected to face-to-face confrontation with persons who have devious intentions and who disguise themselves as door-to-door sales people. (*Cf.*) (*Breard v. Alexandria,* 341 U.S. 622; *Kovacs v. Cooper,* 336 U.S. 77.)

The recipients are in no other position than they are with their radios and televisions in this modern and complex society. The rays that are in the cathode tubes in each person's home and may explode with offensiveness or erotically arousing or sexually provocative fare when the television set is turned on, exploits privacy of the home more so than the envelope deposited in the mailbox. Shall a tenuous distinction be drawn between a fact that a mailbox may be outside of the home and the television within the home and, hence, the latter is closer to the center of the zone of privacy and, therefore thrusts forth a greater threat to one's privacy.

The statute here in question does not seek to shield or guard minors from materials which are otherwise unlawful. Indeed, let the Congress of the United States make this material unlawful if it can meet the Constitutional measures, and let it set forth to protect the persons they deem protectible and then let the statute attempt to pass the Constitutional muster.

Yet, further, if it is adopted that there is a specific and fundamental guarantee of right of privacy under the First Amendment or Fifth Amendment via the thesis that this concept is "so rooted in the traditions and conscience of our people as to be ranked as fundamental" then it is submitted that the irresistable force has indeed met the immovable object. If this be the situation, Appellants submit that in the balancing of the interests under the circumstances here at hand and particularly involving an envelope with a notification of what is

involved,[17] that the right of privacy must yield to the right of free speech and press.

In the case of *Lamont v. Commissioner of Motor Vehicles,* 269 F. Supp. 880, the proposition was stated more eloquently than this writer is capable of doing. The court said:

> ". . . The mailbox, however noxious its advertising contents, often seem to judges as well as other people, is hardly the kind of enclave that requires constitutional defense to protect 'the privacies of life'. The short, the regular journey from mailbox to trash can—the contents of which the state chooses to pay the freight when it facilitates the distribution of trash—is an acceptable burden, at least so far as the Constitution is concerned. The bells at the door and on the telephone, through their ring, is more imperious nuisance than the mailman's tidings, accomplish more peripheral assaults than the blare of an inescapable radio."

It should be noted that in the case of *Breard v. Alexandria,* 341 U.S. 622, undoubtedly to be cited as support for the opposition, the court in upholding a non-solicitation ordinance pointed out:

> ". . . *The usual methods of solicitation—*radio, periodicals, mail, local agencies—are open.*" (Emphasis added).

For these reasons Appellants seek to lay to rest in this specific instance the objection as allegedly supported by the concept of the right of privacy.

---

[17]Appendix 28 Exhibit D.

IX.

The Uncontroverted Evidence Together With the Concurrence as to Statutory Interpretation Does Not Support the Decision and an Injunction Should Have Issued.

The legislative history, the government's concurrence in the appellants' view of the statutory purpose, the intent and the plain meaning of the statute does not support the findings of fact and conclusions of law. The affidavits of the several appellants all of which were uncontroverted stand only in opposition to the findings of fact.

Further the multiplicity of litigation and the irreparable harm wrought by this statute gave rise to the need for the injunction sought.

Here as in *Dombrowski v. Fister,* 380 U.S. 479 injunction is appropriate. The statute has a chilling effect and threatens litigation and prosecution. The denial thereof and dismissal below is not supported in fact or law.

Conclusion.

It is respectfully submitted that the argument of Appellants should be sustained. Appellants urge that Section 301 of Public Law 90-206 (39 U.S.C. § 4009) should be declared null and void because it is unconstitutional for each and all for reasons contained herein. Appellants request that the judgment of the Court below be reversed.

JOSEPH TABACK,
GOLD, HERSCHER & TABACK,
Attorneys for Appellants.

EXHIBIT A.

UNITED STATES OF AMERICA
POST OFFICE DEPARTMENT

Quality Products
~~Post Office~~
PO Box 1045
Hawthorne, CA 90250

PROHIBITORY ORDER

NO. 37

WHEREAS, we were furnished a mailing piece containing advertising matter which you mailed or caused to be mailed to

Jos. E. Martin
(Name of Addressee)

Boaz, Alabama 35957;
(Address)

and

WHEREAS, said addressee has determined your advertisement to be a pandering advertisement offering for sale erotically arousing or sexually provocative matter; and

WHEREAS, said addressee has requested the issuance of an order pursuant to the provisions of Title 39, U.S. Code, 4009, a copy of which law is printed on the reverse side hereof, directing you and your agents or assigns, to refrain from making any further mailings to him [~~and his minor children residing with him who have not attained the age of eighteen years~~].

NOW, THEREFORE, pursuant to the cited statute and the authority delegated to me by the Postmaster General, Title 39, C.F.R. 956, _____ F.R. _____, you, your agents and assigns, are hereby ordered:

(1) To refrain from any further mailings to the following parties at the indicated address, or intended for the indicated address by any variation of addressee designation, such as, but not limited to, occupant, householder, resident, boxholder, postal patron, rural route boxholder, and local, effective on the 30th calendar day after your receipt of this order:

_____ _____
_____ _____
_____ _____

ADDRESS: 702 Martin Avenue
(Street)

Boaz, *(City)* Alabama *(State)* 35957 *(ZIP Code)*

(2) To immediately delete the above-named parties from all mailing lists owned or controlled by you or your agents or assigns.

(3) To immediately abstain from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the parties mentioned above.

BY ORDER OF THE POSTMASTER GENERAL

E. F. PALMER, POSTMASTER

E. F. Palmer
Postmaster

Birmingham, AL 35203
Address

[POSTMARK] BIRMINGHAM, ALA. APR 26 1968

Dated: April 26, 1968

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 399

DANIEL ROWAN, d.b.a. AMERICAN BOOK SERVICE, et al.,
Appellants,

against

UNITED STATES POST OFFICE DEPARTMENT, et al.,
Appellees.

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Amicus Curiae
Office & P. O. Address
80 Centre Street
New York, New York 10013.
Telephone: (212) 488-7421

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

LLOYD G. MILLIKEN
Senior Attorney
of Counsel

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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IN THE

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Appellees.

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

Interest of the *Amicus*

Louis J. Lefkowitz, Attorney General of the State of New York, and as such the principal law officer of the State of New York, submits this brief *amicus curiae* in support of affirmance of the decision of the Court below pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States.

The State of New York, with a population in excess of eighteen million persons, has been greatly concerned with the related problems of obscenity and pandering advertisements for obscene matter.

New York has recognized that obscenity does not exist in a vacuum; that material is not inherently "obscene"

but rather obscene only in relation to the group at which the material is directed. As a result, New York has enacted penal laws proscribing the dissemination of certain matter to minors under 17 years of age even though the material may be distributed to adults. New York Penal Law §§ 235.20, 235.21 and 235.22.

The concept of a variable standard of obscenity, suggested by this Court in *Mishkin* v. *New York*, 383 U. S. 502 at 508, 509, has permitted New York and other jurisdictions to penalize public pollution without abridgment of the rights of free expression.

The problem of mail advertisements originating out of state for material that is either obscene or offensive is much more vexing. The Attorney General of the State of New York has received thousands of complaints from recipients of unsolicited advertisements for obscene material including material specifically directed towards sexually deviant audiences.

In many instances, the complainants were the educators or parents of young children. The tenor of these complaints is markedly similar. The writers are particularly frightened that the advertisements for materials graphically depicting sodomy and other deviate sexual conduct will fall into the hands of impressionable children.

The writers are also disturbed by the possibility that these advertisements will destroy the ethical and religious values the writers have taught to children and thereby impair both the moral standards of the young and parental authority. Finally, there is the frustration felt by many people that they are powerless to prevent the intrusion of this pollution into their homes.

Since only Congress is empowered to curtail the *mailing* of unwanted material to unwilling recipients,[1] the State of New York files this brief as *amicus curiae* in support of Congress' exercise of legislative power in enacting Public Law 90-206, the law here in issue.

---

[1] United States Constitution, Article I, Section 8.

Question Presented

Does Section 301 of Public Law 90-206 abridge appellants' right of free speech?

Statutory Provision Involved

Public Law 90-206 (81 Stat. 645), as subsequently codified as 39 U.S.C. (Supp. IV) 4009, provides:

> "§ *4009. Prohibition of pandering advertisements in the mails.*
>
> (a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postmaster General to refrain from further mailings of such materials to designated addressees thereof.
>
> (b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postmaster General shall issue an order, if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees.
>
> (c) The order of the Postmaster General shall expressly prohibit the sender and his agents or assigns from making any further mailings to the designated addressees, effective on the thirtieth calendar day after receipt of the order. The order of the Postmaster General shall also direct the sender and his agents or assigns to delete immedately the names of the designated addressees from all mailing lists owned or con-

trolled by the sender or his agents or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

(d) Whenever the Postmaster General believes that the sender or anyone acting on his behalf has violated or is violating the order given under this section, he shall serve upon the sender, by registered or certified mail, a complaint stating the reasons for his belief and request that any response thereto be filed in writing with the Postmaster General within fifteen days after the date of such service. If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a district court of the United States for an order directing compliance with such notice.

(e) Any district court of the United States within the jurisdiction of which any mail matter shall have been sent or received in violation of the order provided for by this section shall have jurisdiction, upon application by the Attorney General, to issue an order commanding compliance with such notice. Failure to observe such order may be punished by the court as contempt thereof.

(f) Receipt of mail matter thirty days or more after the effective date of the order provided for by this section shall create a rebuttable presumption that such mail was sent after such effective date.

(g) Upon request of any addressee, the order of the Postmaster General shall include the names of any of his minor children who have not attained their nineteenth birthday, and who reside with the addressee.

(h) The provisions of subchapter II of chapter 5 (relating to administrative procedure) and chapter 7 (relating to judical review) of part I of title 5, United States Code, shall not apply to any provisions of this section.

(i) For the purposes of this section—

(1) mail matter, directed to a specific address covered in the order of the Postmaster General, without designation of a specific addressee thereon, shall be considered as addressed to the person named in the Postmaster General's order; and

(2) the term "children" includes natural children, stepchildren, adopted children, and children who are wards of or in custody of the addressee or who are living with such addressee in a regular parent-child relationship."

ARGUMENT

POINT I

39 U.S.C. § 4009 does not abridge freedom of the press or the right of free speech.

Appellants, book publishers and distributors, owners of mail order houses, list brokers and sellers of books and other items through the mails, have attempted to elevate a modest regulation upon their obviously commercial activities into a question relating to the free expression of ideas.

This Court has held "that obscenity is not within the area of constitutionally protected speech or press." *Roth* v. *United States*, 354 U. S. 476, 485. This holding has recurred in differing forms in many subsequent cases. *E.g.*

Smith v. *California*, 361 U. S. 147, 152; *Ginsberg* v. *New York*, 390 U. S. 629; *Stanley* v. *Georgia*, 394 U. S. 557. Obviously if the materials advertised or the advertisements themselves are obscene, the statute does not interfere with the freedom of the press.

Even if appellants' material is not obscene, the solicitation of magazines for purely commercial purposes may be controlled or proscribed for purposes that lie within the public interest. *Valentine* v. *Chrestensen*, 316 U. S. 52; *Breard* v. *Alexandria*, 341 U. S. 624.

In *Breard* v. *Alexandria*, *supra*, this Court, in sustaining the constitutionality of a so-called "Green River ordinance" of a municipality which prohibited, *inter alia*, door-to-door solicitation of subscriptions for innocuous magazines without prior consent, stated (p. 645):

> "• • • It would be, it seems to us, a misuse of the great guarantees of free speech and free press to use those guarantees to force a community to admit the solicitors of publications to the home premises of its residents. We see no abridgment of the principles of the First Amendment in this ordinance."

Since the commercial distribution of written matter has been held to be subject to regulation by local governments in the exercise of their police power (*Breard* v. *Alexandria*, *supra*), there should be no doubt as to the power of Congress, through its control over the mail,* to relieve householders of the burden of receiving commercial advertisements through the mail to which the recipients have expressed strong antipathy.

---

* The authority of Congress to bar other forms of written communication from the mail, despite the protections afforded by the First Amendment, has long been recognized by this Court, most notably in schemes for obtaining money through fraudulent pretenses. *Public Clearing House* v. *Coyne*, 194 U. S. 497; 39 U.S.C. § 4005.

The material offered for sale by the appellants is clearly devoid of any ideological content. Since the material does not serve to communicate ideas or disseminate information, except perhaps to the deviant and perverted who might find it informative or entertaining or both, the material is not entitled to the rights secured by the First Amendment.

The fact that appellants' advertisements are no more than the commercial exploitation of erotica solely for the sake of prurient appeal clearly labels this material as obscene. *Ginzburg* v. *United States*, 383 U. S. 463.

POINT II

39 U.S.C. § 4009 is a legislative implementation of the right to privacy.

Upon the faulty premise that their advertising is expression protected by the First Amendment, appellants suggest that an audience must be provided.

Appellants' contention ignores each citizen's right of privacy which has been called "the right most valued by civilized men." Mr. Justice Brandeis dissenting in *Olmstead* v. *United States*, 277 U. S. 438, 478. *Amicus* respectfully submits that the paramount right of privacy would be invaded by the appellants if the statute in issue is enjoined. The Court has manifested its interest in the quiet enjoyment of the home and has protected this right even against opposing claims involving the exercise of the police power. *Stanley* v. *Georgia*, 394 U. S. 557; *Griswold* v. *Connecticut*, 381 U. S. 479; *NAACP* v. *Alabama*, 357 U. S. 449.

Certainly, if the Court can counterpoise freedom from unwanted intrusion in the home against the exercise of police power and find the former to be of greater weight, this Court should sustain the right of privacy against the noxious effluent the appellants seek to force upon unwilling recipients under the guise of the exercise of free speech.

CONCLUSION

The decision of the Court below should be affirmed.

Dated: New York, New York, January 7, 1970.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Amicus curiae

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

LLOYD G. MILLIKEN
Senior Attorney
of Counsel

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No. 399

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

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Appellants,

v.

UNITED STATES POST OFFICE DEPARTMENT, ET AL.,
Appellees.

On Appeal From the United States District Court for the Central District of California

---

BRIEF FOR DIRECT MAIL ADVERTISING ASSOCIATION, INC., AMICUS CURIAE

DAVID E. MCGIFFERT
E. EDWARD BRUCE
888 - 16th Street, N.W.
Washington, D. C. 20006
Attorneys for Direct Mail Advertising Association, Inc.

Of Counsel:

COVINGTON & BURLING
888 - 16th Street, N.W.
Washington, D. C. 20006

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 399

DANIEL ROWAN, D.B.A. American Book Service, ET AL.,
Appellants,

v.

UNITED STATES POST OFFICE DEPARTMENT, ET AL.,
Appellees.

On Appeal From the United States District Court for the Central District of California

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BRIEF FOR DIRECT MAIL ADVERTISING ASSOCIATION, INC., AMICUS CURIAE

This brief on behalf of the Direct Mail Advertising Association, Inc. (DMAA), as amicus curiae, is filed with the written consent of both Appellants and Appellees. With 2600 members, DMAA is the largest trade association representing firms involved in advertising by mail. Its members include users of the mail

for advertising purposes (to promote their own goods, services or charitable causes or those of others), creators of mail advertising materials (such as advertising agencies) and suppliers (such as paper and envelope manufacturers).

OPINION BELOW

The opinion of the United States District Court for the Central District of California, which is not yet reported, is printed in the Appendix.

JURISDICTION

The judgment of the United States District Court for the Central District of California was entered on April 30, 1969. Appellants filed a timely notice of appeal and jurisdictional statement pursuant to 28 U.S.C. § 1253, and this Court noted probable jurisdiction on October 27, 1969.

QUESTION PRESENTED

Under review is a decision of a three-judge district court upon summary judgment that Section 301(a) of P.L. 90-206, 39 U.S.C. § 4009, is not unconstitutional on its face. Accordingly, DMAA believes that the question presented is:

> Whether 39 U.S.C. § 4009 is unconstitutional on its face because it bars any administrative or judicial inquiry into the "pandering" character of mail complained of under the statute and thus applies to all types of mailed advertising matter or whether the statute permits such inquiry, and thus applies only to advertisements which could reasonably be considered "pandering," thereby avoiding constitutional infirmities?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provisions of the Constitution and laws of the United States bear upon the arguments advanced DMAA:

The First Amendment of the Constitution of the United States, which provides in pertinant part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

The Fifth Amendment of the Constitution of the United States, which provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

Section 301(a) of P.L. 90-206, 39 U.S.C. § 4009, which is set forth in full at pages 3-5 of the Appellants' brief.

STATEMENT

Section 4009 allows the addressee of a mailed "pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative" to obtain a Prohibitory Order from the Post Office Department directing the sender of that advertisement "to refrain from further mailings of such materials" to that addressee. To insure this cessation of further mailings, the sender upon whom such a Prohibitory Order is served must strike the addressee's name from all mailing lists which he owns, rents or controls. Failure to comply with a Prohibitory Order can bring about an enforcement proceeding in a federal district court by the United States Attorney General and can ultimately result in a contempt citation.

To the best of DMAA's knowledge, none of its members engage in advertising that could in any sense be considered "pandering." Both DMAA's "Business Ethics"[1] and "Operating Standards of Practice"[2] prohibit such advertising. Nonetheless, the Post Office Department has served many Prohibitory Orders under Section 4009 upon DMAA members for advertising such things as The Family Heritage Bible, La Salle Extension University, Business Week Magazine, Illustrated Electronics Course, The Christian Herald's Family Bookshelf, The American Scholar Magazine, The Center for the Study of Democratic Institutions, Roget's International Thesaurus, hospital insurance plans, grocery store weekend specials, tool kits, etc. This experience of DMAA's members indicates that Section 4009 has been indiscriminately employed against all types of advertising.

That upon receipt of a complaint the Post Office automatically issues a Prohibitory Order regardless of the nature of the advertisement is confirmed by the Post Office's own official guide for administering the statute:

> "When determined that the patron has properly done his part . . . the mailing which the patron has characterized as a pandering advertisement must

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[1] Paragraph (D) of the DMAA Business Ethics provides:

> "We will keep our mailings equal to or above the personal standard of decency as presently observed. Immoral, salacious or offensive mailings make enemies for our entire medium."

[2] Paragraph 11 of the DMAA Operating Standards of Practice provides:

> "Mailings will not contain vulgar, immoral, profane or offensive matter nor will members use the mails to promote the sale of gambling devices, pornographic material or other matter not acceptable for mailing on moral grounds."

> be examined to determine if it is, in fact, an advertisement. It is important to emphasize . . . that the only question to be determined . . . with respect to the offending mail piece is whether it constitutes an advertisement. The Department has no authority to review or question the patron's decision that the subject matter of the offending mail piece is erotically arousing or sexually provocative." Post Office Department Publ. No. 125, p. 5 (April, 1968).

While the application of Section 4009—which is entitled "Prohibition of pandering advertisements in the mails"—to advertisements for such things as the Family Heritage Bible, The Center for Study of Democratic Institutions, or tool kits may lead bystanders to smile, in fact it is no laughing matter.

In the first place, to be labeled a "pandering" advertiser when there is no reasonable basis therefor, and particularly to be so labeled by an official order of the United States Government, is an unwarranted smear upon the advertiser and upon the goods, services, or causes his advertisement promotes.

Secondly, compliance with Prohibitory Orders under Section 4009 involves a substantial amount of time, effort and money. For the order requires that a mailer, his agents, or assigns remove the complaining addressee's name from all of his mailing lists, including those which he owns, rents or controls, and that for the indefinite future he engage in no transactions involving mailing lists bearing the addressee's name. This is often a very complicated and expensive process.

To comply with a Prohibitory Order with respect to lists that are owned by the mailer involves varying costs depending upon whether the lists are computerized or manually compiled, as are those of many of the

smaller mailers. In many situations it is virtually impossible to remove a name without engaging in a time consuming visual check. There is even greater expense and complication where lists are leased from others. In such situations the mailer-lessee must insure that every lessor from whom lists are ordered removes the name of a complaining addressee.[3] This perforce involves continuing surveillance by the mailer and by all the lessors with whom he does business.

The Appellants in their affidavits before the district court indicated that the weekly expense of removing prohibited names from lists amounted in some cases to between $150 and $500 (R. 64, 83) and that they had spent thousands of dollars in attempting to comply with Section 4009 (R. 64, 80). Their affidavits also indicated that it can cost more than $5.00 to remove a single name from a mailing list (R. 68, 83). The general experience of DMAA members is that in many instances compliance with a single Prohibitory Order costs many times this amount.

Both because of the stigma attached and the effort and expense involved, DMAA and its members are acutely concerned with the way in which Section 4009 has been indiscriminately applied by the Post Office Department. DMAA accordingly files this brief as amicus curiae to urge that the Post Office has so misconstrued the statute as to impair its constitutionality and to suggest a way in which its constitutionality can be preserved.

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[3] Typically, leased mailing lists remain in the possession of the lessor, who performs the actual mailing function for the lessee. Accordingly, the lessee himself cannot inspect leased lists for compliance with Prohibitory Orders, but must instead rely upon the actions of the lessor. Further, the lessor typically rents the list to many lessees, so that he is faced with the problem of purging his list for one lessee but not for others.

POSITION OF AMICUS DMAA AND INTRODUCTION TO ARGUMENT

This case involves two overlapping rights of mail advertisers—the freedom of speech and press protected by the First Amendment and the "civil right of using the mail for lawful purposes," *Milwaukee Pub. Co.* v. *Burleson,* 255 U.S. 407, 424 (Justice Brandeis dissenting). Section 4009 limits both. Since "grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever," *Hannegan* v. *Esquire, Inc.,* 327 U.S. 146, 156, this Court can sanction the impediment to the free flow of mail that inheres in Section 4009 only by limiting its application to mailed material as to which Congress had a valid and overriding regulatory purpose.

The key to that purpose is the term "pandering," which appears both in the title of Section 4009 and in the portion of the statute, subsection 4009(a), which defines its scope. Unfortunately, the Post Office Department, which vigorously opposed enactment of Section 4009,[4] has, by issuing Prohibitory Orders without regard to the "pandering" character of the mail complained of, applied the statute as though it allows anyone "on any grounds whosoever" to impair an advertiser's right to use the mails. Thus, the term "pandering" has been read out of the statute and Section 4009 has been made unconstitutionally broad.

This overbreadth can be cured only by giving meaning to the terms of the statute and ensuring by administrative and judicial review that the mail com-

[4] See, Hearing on H.R. 7977 before the Committee on Post Office and Civil Service, U.S. Senate, 90th Cong., 1st Sess., pp. 534-65 (1967).

plained of can reasonably be considered a "pandering advertisement." Thus, DMAA contends that the constitutionality of Section 4009 can be preserved only by requiring the exercise of administrative discretion in the Post Office's enforcement of the statute—an *ex parte* determination prior to the issuance of an order as to whether the challenged materials can reasonably be considered "pandering"—and by allowing mail advertisers, who are called before a federal district court for failure to comply with a Prohibitory Order, to obtain an independent judicial determination of whether their mailed advertising is genuinely "pandering."

I. GRAVE CONSTITUTIONAL QUESTIONS WOULD ARISE FROM HOLDING THAT SECTION 4009 ALLOWS NO ADMINISTRATIVE OR JUDICIAL REVIEW OF THE CHARACTER OF MAIL COMPLAINED OF UNDER THE STATUTE AND THEREFORE APPLIES TO ALL MAILED ADVERTISEMENTS.

A. The Application of Section 4009 Must Conform to the Requirements of the Federal Constitution.

Although the processes of Section 4009 are triggered by a private citizen's complaint about a particular piece of mail, the statute is enforced solely through administrative procedures of the United States Post Office Department and the contempt power of United States District Courts. Plainly, the Constitution does not limit the freedom of addressees to complain about anything that they receive in the mail. But equally plainly the administrative and judicial processes of the federal government that are set in motion by an addressee's complaint are, like all other government actions, subject to the limitations of the Constitution. For there is a vast difference between the action of individuals and civic groups who desire to limit the

flow of offensive material and the intercession of the government to assist such persons:

> "It is one thing for parents and religious organizations to be active and involved [in combating pornography]. It is quite a different matter for the state to become implicated as a censor." *Ginsburg* v. *New York*, 390 U.S. 629, 655 (Mr. Justice Douglas, dissenting).

By enforcing through fines and even jail terms an individual's opposition to the receipt of mailed advertising materials, the federal government becomes thoroughly "implicated" in that person's decision. *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58. *See also, Shelley* v. *Kraemer*, 334 U.S. 1; *Reitman* v. *Mulkey*, 387 U.S. 369. Thus, the actions of federal officials charged with enforcing Section 4009 must conform to applicable constitutional principles.

Similarly, the scope of Section 4009 is not free from the constitutional scrutiny of this Court merely because it deals with advertisements. Admittedly, this Court has in certain contexts allowed local regulation of advertising materials. *Valentine* v. *Chrestensen*, 316 U.S. 52; *Breard* v. *Alexandria*, 341 U.S. 622. But such regulations have pertained to the power of local governments to control the use of streets and sidewalks, a matter of acute local concern. *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 152. Federal regulation pertaining to the use of the mails raises far more troublesome questions. Compare *Roth* v. *United States*, 354 U.S. 476, 496-508 (opinion of Mr. Justice Harlan).

Moreover, it has long been clear that the broad pronouncements in cases like *Valentine* disclaiming any

constitutional concern with the regulation of advertising have been rejected both explicitly, *Commarano* v. *United States*, 358 U.S. 498, 514 (Mr. Justice Douglas concurring: the *Valentine* dicta with respect to the regulation of commercial advertising was "casual, almost offhand. And it has not survived reflection.") and implicitly by the many recent decisions of this Court that have applied the protection of the First Amendment both to advertising as such and to other manifestations of commercial speech, *Manual Enterprises Inc.* v. *Day*, 370 U.S. 478, 491-95; *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 265-66; *Time, Inc.* v. *Hill*, 385 U.S. 374, 396-97; *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 617.

Finally, many of the mailed advertising materials that have been subjected to Post Office Prohibitory Orders under Section 4009 pertain to books, magazines, courses of instruction in universities, political programs and the like, which are themselves plainly protected by the First Amendment. See p. 4, *supra*. Advertisements promoting materials such as these must be protected by the First Amendment if those materials are to be sold in the market place of ideas.

B. In View of Its Impact Upon Constitutionally Protected Rights of Free Press, Speech and Use of the Mails' Section 4009 Can Be Upheld Only if It Is Construed as Applying to Mailed Matter That Is in Fact a "Pandering Advertisement."

As noted above, pp. 5-6, an addressee's invocation of Section 4009 does much more than intercept mail at the Post Office. The mailer is compelled to take affirmative (and often complex and costly) action to insure the cessation of further mailings to the addressee by removing his name from any mailing lists owned,

rented, or controlled by the mailer and by avoiding any sale, rental, exchange or other transaction involving mailing lists bearing the name of the addressee.

Because of the effort and expense it inflicts on mailers, Section 4009, if not limited to genuinely "pandering advertisement," invites use of the administrative and judicial processes of the federal government to harry ideologically-oriented mailers. For example, the order issued against the New York Civil Liberties Union for advertising the periodical "Civil Liberties" (See *United States* v. *Cybertype Corporation,* 68 Civ. 3683, S.D.N.Y., Defendant's Ex. 4) was in all likelihood prompted by a desire to harass that organization. A sufficiently large number of such complaints would almost certainly impose prohibitive costs upon the mail advertisement of a political magazine; even a small number of complaints might have the same result if the magazine were financially weak. Compare *Saia* v. *New York,* 334 U.S. 558, 562. This same point was made by Assistant Attorney General Wozencraft in his testimony opposing Section 4009 during Senate consideration of the bill:

> "It is possible that, as a practical matter, if enough people put a sender on their blacklist, they would be putting him to so much expense in doctoring his mailing list that, in effect, he would be deprived of the opportunity to disseminate what might be political ideas, to a degree that the court might find really posed difficulties under the first amendment." Hearings on H.R. 7977 before the Committee on Post Office and Civil Service, U.S. Senate, 90th Cong., 1st Sess., p. 576 (1967).

Even absent such abuse, however, the effort and expense involved in complying with Section 4009 poses an obstacle to the use of the mails that can be justified,

if at all, only by an important government interest. *Lamont* v. *Postmaster General,* 381 U.S. 301.

In *Lamont* the Court struck down a provision of the federal postal laws that required an addressee to respond affirmatively to a communication from the Postmaster General that the addressee desired to receive "communist political propaganda" mail matter. The Court concluded "that the Act . . . is unconstitutional because it requires an official act (*viz.,* returning the reply card) as a limitation on the unfettered exercise of the addressee's First Amendment rights." 381 U.S. at 305. As the concurring Justices pointed out (Mr. Justices Brennan, Goldberg and Harlan), "in the area of First Amendment freedoms, government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose." 381 U.S. at 310.

Thus, the teaching of *Lamont* is that an impediment to the use of the mails—even one which can be overcome by compliance with postal regulatory procedures—is justified only if the regulatory procedures are tailored to deal in a precise and narrow manner with a legitimate legislative interest.

This rule is merely an application of a more general principle that governs the propriety of government action affecting First Amendment freedoms:

> "An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' "

Carroll v. *President & Comm'rs of Princess Anne,* 393 U.S. 175, 183-84. See also *Shelton* v. *Tucker,* 364 U.S. 479, 488; *NAACP* v. *Button,* 371 U.S. 415, 437-38, 444; *Stanley* v. *Georgia,* 394 U.S. 557, 563.

Section 4009 as now applied by the Post Office Department does not meet this requirement. For there is no legitimate government interest that justifies inflicting on all mail advertisers the effort and expense required for compliance with Section 4009 to protect addresses from unwanted mail regardless of its nature.

It is true that the majority below, against the well-reasoned argument of Judge Hufstedler's concurring opinion, rested its decision in large measure upon an assumed government interest in protecting the "privacy" of the home against such mail. But, in fact, no "privacy" interest is protected by Section 4009, as that term has been used in the recent landmark decisions of this Court.

"Privacy" in *Griswold* v. *Connecticut,* 381 U.S. 479, *Time, Inc.* v. *Hill,* 385 U.S. 374, Mr. Justice Brandeis' dissent in *Olmstead* v. *United States,* 277 U.S. 438, 478, and other cases decided under the Fourth and Fifth Amendments has to do with protecting the individual in his home or elsewhere from the prying eyes of the State or unauthorized persons. "Privacy, thus, is control over knowledge about oneself. * * * It [is] . . . that aspect of social order by which persons control access to information about themselves." Fried, *Privacy,* 77 Yale L.J. 475, 483, 493 (1968).

The protection which Section 4009 affords addressees of mail in no way concerns the exposure of information which they wish to keep private. Instead, Section 4009 prevents certain kinds of information from reaching addressees.

It has never been held that there is a constitutional protection equivalent to that afforded "privacy" which allows persons to shut themselves off from all unwanted communications. It has been urged, in dissent, that the right of privacy "is, simply stated, the right to be let alone; to live one's life as one chooses, free from assault, intrusion or invasion except as they can be justified by the clear needs of community living under a government of law." *Time, Inc.* v. *Hill, supra* at 413 (dissenting opinion). But this Court has rejected the imposition of such a burden upon the person who trys to reach others with his ideas:

> "Exposure of self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press." *Time, Inc.* v. *Hill, supra* at 388.

Moreover, it has been expressly held that the receipt of unwanted mail is not something that can be barred by the invocation of a constitutional protection of "privacy." *Lamont* v. *Comm'r of Motor Vehicles,* 269 F. Supp. 880, 883 (S.D.N.Y., Frankel, D.J.), *aff'd per curiam,* 386 F.2d 449 (2d Cir. 1967):

> "There is no captive quality in the plight of which plaintiff complains. The mail box, however noxious its advertising contents often seem to judges as well as other people, is hardly the kind of enclave that requires constitutional defense to protect 'the privacies of life.' The short, though regular, journey from mailbox to trash can—for the contents of which the State chooses to pay the freight when it facilitates the distribution of trash —is an acceptable burden, at least so far as the Constitution is concerned. And the bells at the door and on the telephone, though their ring is a more imperious nuisance than the mailman's ti-

dings, accomplish more peripheral assaults than the blair of an inescapable radio."

Rather than pertaining to "privacy," the congressional purpose underlying Section 4009 is similar to that involved in cases such as *Breard* v. *Alexandria,* 341 U.S. 622, *Kovacs* v. *Cooper,* 336 U.S. 77, and *Saia* v. *New York,* 334 U.S. 558, which dealt respectively with door-to-door solicitation, sound trucks on public streets, and sound systems in public parks. These cases make it abundantly clear that the government cannot guarantee its citizens an absolute right to serenity against all those who try to reach them with ideas:

> "This case calls for an adjustment of constitutional rights in the light of the particular living conditions of the time and place. Everyone cannot have his own way and each must yield something to the reasonable satisfaction of the needs of all." *Breard* v. *Alexandria, supra* at 626.

Thus, in *Breard* it was held that a city could reasonably restrict door-to-door solicitation since, quoting Zachariah Chafee, "of all the methods of spreading unpopular ideas, this [house-to-house canvassing] seems the least entitled to extensive protection." 341 U.S. at 639, n. 27. But see *Martin* v. *Struthers,* 319 U. S. 141.[5] Moreover, the Court in *Breard* noted that

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[5] In *Martin* v. *Struthers,* 319 U.S. 141, the Court, while striking down a general prohibition against door-to-door solicitation, did suggest that a statutory scheme which allowed individuals to exclude solicitors would not be unconstitutional. 319 U.S. at 147-48. However, the means suggested by the Court for accomplishing this exclusion would not have entailed anything like the effort and costs involved in a mailer's compliance with Section 4009. Moreover, the interest in *Martin* in keeping out solicitors, was much more like the conventional "privacy" interest discussed above, p. 13, than the interest underlying Section 4009, for exposure at the doorway of the home to a solicitor can reveal information which the homeowner desires to keep to himself.

"the usual methods of solicitation—radio, periodicals, *mail,* local agencies—are open." 341 U.S. at 631-32. (emphasis added). And in *Kovacs* it was held not unreasonable for a city to pass an ordinance forbidding the use of sound trucks that if unregulated would have disturbed the living and working habits of the town's citizens. The decision in *Saia,* on the other hand, which struck down an ordinance allowing police regulation of a sound system in a public park, can be best reconciled with *Kovacs* by the principle of reasonableness—it being less of an intrusion to subject unwilling listeners in parks to a loudspeaker than listeners in their homes. *Cf. Public Utilities Commission* v. *Pollak,* 343 U.S. 451.[6]

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[6] The drafters of the Restatement of Torts, Second, have recognized an individual's interest in avoiding "intrusion upon his seclusion," as a conceptually distinct aspect of the right to recover for "interference with privacy," A.L.I. Restatement of the Law, Second, Torts, Tentative Draft No. 13, pp. 100-107 (April 27, 1967), only in the following circumstances:

> "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another, or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, *if the intrusion would be highly offensive to a reasonable man.*" *Id.* at 103. (emphasis added).

The cases upon which the drafters of the Restatement rely all declare that the intrusion must be one which by the standard of a reasonable man would be deemed offensive. See, *e.g.,* Harms v. Miami Daily News, Inc., 127 So.2d 715, 718 (Fla. D.C.A. 1961):

> "In determining the extent of the right of privacy, the standard by which the right is measured is based upon a concept of the man of reasonable sensibility; the hypersensitive individual will not be protected."

See also, Carey v. Statewide Finance Co., 223 A.2d 405, 407 (Conn. C.C. 1966); Horstman v. Newman, 291 S.W.2d 567 (Ky. 1956); Housh v. Peth, 133 N.E.2d 340 (Ohio 1956).

Section 4009 can be upheld under the standard of reasonableness only if it is limited to protecting unwilling persons from bona fide "pandering advertising." For only by preventing the delivery of such advertisements, which inevitably "tend to force public confrontation with the potentially offensive aspects of the work," *Ginzburg* v. *United States,* 383 U.S. 463, 470, see also *Redrup* v. *New York,* 386 U.S. 767, 769, can such persons be spared a confrontation that they might reasonably find highly offensive, it being necessary to read or inspect an advertisement to discern its contents. Mail advertisers can therefore be required to make a reasonable accommodation to the interest of persons who wish to avoid exposure to such advertising.

But persons who object to mail advertising that cannot reasonably be held to cause an offensive confrontation must, rather than imposing effort and expense on mailers of such advertising, themselves make an accommodation. They must make "the short, though regular, journey from mailbox to trash can" (a trip they must at some point make for non-advertising mail as well) to adjust for the rights of mail advertisers to use the mails and enjoy the freedom of speech and press guaranteed by the First Amendment.

In the context of Section 4009, this adjustment in rights between the unwilling addressee and the mail advertiser can be made only by an independent review that is sufficient to insure the statute's application solely to mailers engaged in pandering advertising.

C. Other Constitutional Considerations Require an Independent Administrative and Judicial Determination of the "Pandering" Character of Materials Complained of Under Section 4009.

1. The Need To Establish the Mailer's Scienter.

Since Section 4009 requires the mailer, his agents, and assigns to remove a complaining addressee's name from all mailing lists and to avoid any transactions in mailing lists bearing such addressee's name—thereby imposing substantial effort and expense upon the mailer—it can be applied only to mailers who can reasonably be held to have known the "pandering" character of their materials. *Manual Enterprises, Inc.* v. *Day,* 370 U.S. 478.

In that case the Government contended that it was not required to establish *scienter* against a magazine publisher whose advertisers allegedly purveyed obscene materials, since the obscene-advertising statute before the Court involved a civil sanction impeding the flow of mail, not criminal punishment. Mr. Justice Harlan in his opinion announcing the judgment of the Court flatly rejected that contention:

> "In the constitutional climate in which this statute finds itself, we should hesitate to attribute to Congress a purpose to render a publisher civilly responsible for the innocuous advertisements of the materials of others, in the absence of any showing that he knew that the character of such materials was offensive . . . . [W]e should be slow to accept the suggestion that an element of proof expressly required in a criminal proceeding may be omitted in an altogether parallel civil proceeding . . . . [A] substantial constitutional question would arise were we to construe § 1461 as not requiring proof of *scienter* in civil proceedings." 370 U.S. at 492.

Mr. Justice Brennan in his concurring opinion for three other members of the Court agreed that among the questions that "loom large in the wake of an order such as the one before us" is "whether Congress can close the mails to obscenity by any means other than prosecution of its sender." 370 U.S. at 497-98. Accordingly, a majority of the Court in *Manual Enterprises* held that a grave constitutional question would be presented were the statute then before it to be construed as not requiring *scienter*.

The teaching of *Manual Enterprises* as it applies here is that Congress cannot have been assumed in the absence of the clearest statutory language and history to have contemplated that Section 4009 would be made applicable to a mailer who had no basis for believing he was engaged in "pandering advertisement." No mailer can be reasonably charged with knowledge that an addressee will find an advertisement for The American Scholar Magazine or for the grocery store weekend special erotically stimulating. But without an administrative and judicial determination as to the actual character of materials challenged under the statute, that is precisely its effect.[7]

2. The Need To Limit the Stigma Associated With Application of the Statute.

It is gravely serious for a mailer, particularly a small businessman who may be unsophisticated in the ways of the law, to receive an official order from the United States Post Office Department that in accordance with

[7] In light of the fact that a Prohibitory Order does not in itself involve sanctions for non-compliance, it should not be difficult for purposes of pre-order administrative review to impute *scienter* to the mailer on the basis of the character of the mail complained of.

the terms of a federal statute he is a panderer. Yet under Section 4009 as it has been applied by the Post Office Department literally hundreds, if not thousands, of persons who are engaged in mail advertising that under no reasonable view could be described as pandering have been so branded.

This application of Section 4009 constitutes a flagrant example of castigation of innocent people by the "arbitrary fiat" of the executive branch. See *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 143 (Mr. Justice Black concurring). Indeed, Section 4009 as applied by the Post Office Department, like the notorious Act of Attainder of James II, invites anyone for any reason to invoke federal administrative and judicial processes in order to impose penalties upon mail advertisers. *Id.* at 146-49 (Appendix to concurring opinion of Mr. Justice Black). See also *United States* v. *Brown*, 381 U.S. 437, 448. This noxious aspect of Section 4009 can be avoided only by holding that an addressee's invocation of the statute is subject to meaningful judicial and administrative review.

3. The Need To Limit the Delegation of Censorship Power to Individual Addressees.

Section 4009 as now applied by the Post Office Department constitutes a do-it-yourself censorship scheme that can be invoked by anyone for any purpose against any mailed advertisement. This unfettered discretion turns the regulatory scheme into one very close to that disapproved in *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, which dealt with a delegation of censorship power to a commission of private citizens. Since the exercise of this power was committed to the discre-

tion of these citizens and was subject neither to supervision nor to administrative or judicial review, the scheme was held to violate the First Amendment rights of book sellers and others whose activities were censored. See also, *Cox* v. *Louisiana*, 379 U.S. 536; *Saia* v. *New York*, 334 U.S. 558; *Cantwell* v. *Connecticut*, 310 U.S. 296.

Only by limiting the addressee's discretion in the manner suggested here—appropriate administrative and judicial inquiry into the actual "pandering" character of mail materials—can this defect in the statute as now applied be cured.

D. To Avoid an Unconstitutional Chilling Effect on the Use of the Mails, the Postmaster General Must, Prior to Issuing a Prohibitory Order, Determine Whether the Material Complained of Can Reasonably Be Considered a Pandering Advertisement.

As shown by its official guidelines, pp. 4-5, *supra*, the Post Office Department already makes pre-order determinations as to whether mail complained of under Section 4009 is an "advertisement." A similar determination as to the "pandering" character of the materials complained of under the statute is constitutionally required.

No proper purpose can be served by the issuance of unenforceable Prohibitory Orders. Indeed, unless the issuance of a Prohibitory Order is preceded by a Post Office determination that materials complained of are prima facie "pandering advertisements," the issuance of the order will have a needlessly inhibiting and chilling effect upon a mailer's First Amendment freedoms. *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58.

In *Sullivan* it was urged, on behalf of a Commission which had merely promulgated public notice of the "objectionable" nature of particular publications, that the "Commission . . . does not regulate or suppress obscenity but simply exhorts book sellers and advises them of their legal rights" 372 U.S. at 66. This Court rejected that argument:

> "This contention, premised on the Commission's want of power to apply formal legal sanctions, is untenable . . . .
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> * * *
>
> "It is true, as noted by the Supreme Court of Rhode Island, that Silverstein was 'free' to ignore the Commission's notices, in the sense that his refusal to 'cooperate' would have violated no law. But it was found as a fact—and the finding, being amply supported by the record, binds us—that Silverstein's compliance with the Commission's directives was not voluntary. People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around, and Silverstein's reaction, according to uncontroverted testimony, was no exception to this general rule. The Commission's notices, phrased virtually as orders, reasonably understood to be such by the distributor, invariably followed up by police visitations, in fact stopped the circulation of the listed publications *ex proprio vigore*." 372 U.S. at 66-68.

The chilling effect of Prohibitory Orders is not lessened by the opportunity for the post-order administrative hearing provided by Section 4009(d). Such hearings would be costly to the mailer, often more costly than compliance with Prohibitory Orders. On the other hand, the exercise of the Post Office pre-order prose-

cutorial discretion, urged here, could be accomplished in an informal, *ex parte* manner, requiring only an inspection of the materials complained of by the addressee.[8]

The Post Office Department should have little difficulty in applying the statute in this manner. The guide to identifying "pandering advertisements," as the terms of Section 4009 and its legislative history show, pp. 27-28, 32-33, *infra*, is this Court's discussion of the meaning of "pandering advertising" in *Ginzburg* v. *United States*:

> "[T]he sordid business of pandering—'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.'" 383 U.S. at 467.
>
> * * *
>
> "The 'leer of the sensualist' also permeates the advertising for the three publications." *Id.* at 468.
>
> * * *
>
> "The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient . . . . [T]he purveyor's sole emphasis is on the sexually provocative aspect of his publications . . . ." *Id.* at 470.
>
> * * *
>
> "[The publishers] deliberately emphasized the sexually provcative aspects of the work, in order to catch the salaciously disposed." *Id.* at 472.

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[8] Such prosecutorial discretion is consistent with the statute. See pp. 29-30, *infra*. By the same token, this informal inspection of mailed materials would not run counter to the wishes of those congressmen who desired to avoid lengthy administrative proceedings under the Act.

See also, *Memoirs* v. *Massachusetts,* 383 U.S. 413, 420-21; *Redrup* v. *New York,* 386 U.S. 767, 769; *Ginsburg* v. *New York,* 390 U.S. 629, 674 (Mr. Justice Fortas dissenting).[9]

E. The Strong Presumption of Judicial Review of Administrative Action and the Mandates of Due Process Require That Courts Which Are Asked to Enforce Section 4009 Make an Independent Determination That Prohibitory Orders Are Based Upon Genuinely "Pandering Advertisements."

Federal courts have an inherent right to inquire into the propriety of administrative orders that they are asked to enforce, since in an enforcement proceeding the court itself becomes affirmatively involved in the judgment of the administrative agency (and in this case in the judgment of the addressee as well):

> "The decree, when entered, is a judicial order . . . . The interposition of the judiciary as the enforcing agency must have some meaning . . . .
>
> "The Board was not given enforcement power; that power was lodged in the courts as a judicial function. Its exercise is not merely mechanical." *NLRB* v. *Eanet,* 179 F.2d 15, 20-21 (D.C. Cir. 1949).

A federal court that is asked to enforce a Prohibitory Order under Section 4009 must therefore inquire into the "pandering" nature of the mailed materials before

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[9] An even more detailed definition of "pandering advertisement" could be derived from the President's Commission on Obscenity and Pornography, July, 1969 Progress Report (pp. 15-16), which concerns a proposed method for identifying sexually-related offensive mailed material for purposes of requiring a mark on envelopes containing such material and sets forth a detailed definition of "offensive sexual material."

issuing an injunction against further mailings of the materials or finding a mailer in contempt.

Additionally, any claim for conclusivity of an addressee or Post Office determination under Section 4009 must overcome the strong presumption favoring judicial review of administrative orders, grounded in the due process clause of the Fifth Amendment, that has been developed in a long series of this Court's decisions. The capstone of the trend towards "tolerance of judicial review [that has become] more and more the rule as against the claim of administrative finality," *Union Pac. R.R.* v. *Price,* 360 U.S. 601, 619 (Mr. Justice Douglas, dissenting), is this Court's decision in *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 139-41:

> "The first question we consider is whether Congress by the . . . Act intended to forbid pre-enforcement review of this sort of regulation promulgated by the Commissioner. The question is phrased in terms of 'prohibition' rather than 'authorization' because a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress . . . . [O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."

See also *United States* v. *ICC,* 337 U.S. 426, 433-35; *Board of Governors* v. *Agnew,* 329 U.S. 441, 444.[10]

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[10] The Court has acted upon this presumption favoring judicial review in many ways. It has in some cases disregarded rather clear evidence of legislative intent to preclude review. Leedom v. Kyne, 358 U.S. 184; *Id.* at 191-95 (dissenting opinion). In other cases, it has relied upon Article III courts' inherent powers to give the relief demanded by the administrative decision under review. Stark v. Wickard, 321 U.S. 288, 310; Shields v. Utah I.C.R.R.,

Since, as will be shown below pp. 30-31, 39, *infra*, there is no "clear and convincing evidence" of a congressional intent to preclude a judicial determination of the nature of materials complained of under Section 4009, the rule of *Gardner* and similar cases requires a construction of the statute that allows for such review.

Moreover, even where the statute explicitly precludes judicial review, this Court has recognized the right to such review. *Oestereich* v. *Selective Service Board*, 393 U.S. 233. In that case it was held that, notwithstanding clear statutory language to the contrary, the plaintiff had a right to pre-induction judicial review as to whether his statutorily-granted draft exemption had been properly applied by the Selective Service Board. In the present case the same scope of judicial review is required—an independent judicial application of Section 4009(a) to determine under that section whether the Prohibitory Order is based on a "pandering advertisement."

While this review must be meaningful, it is not likely to involve the courts in extensive litigation as to the meaning and application of the phrase "pandering advertisement." They would be justified in granting some deference to the Postmaster General's determi-

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305 U.S. 177; Lane v. Hoglund, 244 U.S. 174. And in other cases the Court has held that provisions for the finality of administrative decisions do not foreclose all judicial review. Harmon v. Brucker, 355 U.S. 579; United States v. California Eastern Line, 348 U.S. 351; Shaughnessy v. Pedreiro, 349 U.S. 48; Dickinson v. United States, 346 U.S. 389. In fact, there is "not a single case upholding unreviewability [of administrative action that] is an entirely satisfactory authority in support of the idea that due process permits the denial of review . . . when the party seeking review is resisting enforcement of a legal obligation." 4 Davis, ADMINISTRATIVE LAW § 28.19, at 106.

nation, as evidenced by his issuance of a Prohibitory Order, that a particular piece of advertising can reasonably be considered "pandering" in nature. The kind of careful review that has been necessary in obscenity cases where criminal punishment was being meted out or where a total prohibition on the use of the mails was at issue would not be needed, so long as the Postmaster General did in fact rely upon some objective evidence of pandering to support his order.

II. THE LEGISLATIVE INTENT UNDERLYING SECTION 4009, AS REFLECTED IN ITS TERMS AND LEGISLATIVE HISTORY, PERMITS THE ADMINISTRATIVE AND JUDICIAL REVIEW THAT IS CONSTITUTIONALLY REQUIRED TO NARROW THE APPLICATION OF THE STATUTE TO OBJECTIVELY DETERMINED "PANDERING ADVERTISEMENTS."

To avoid the grave constitutional doubts that would otherwise arise, this Court should construe Section 4009 as allowing judicial and administrative review of whether an advertisement is in fact "pandering," absent the clearest and most unambiguous articulation of congressional intent to the contrary. See *Machinists* v. *Street,* 367 U.S. 740, 749-50; *Lynch* v. *Overholser,* 369 U.S. 705, 710-11; *Watts* v. *United States,* 394 U.S. 705. Neither the language of the statute nor its legislative history evidences a clear congressional intent to ban such review or to make the statute applicable to all mail advertising regardless of its nature.

A. Section 4009 on Its Face Applies Only to Pandering Advertisements and Does Not Preclude an Administrative or Judicial Review as to Whether a Particular Advertisement Is in Fact Pandering.

1. The Statute Applies Only to Pandering Advertisements.

Section 4009 is entitled "Prohibition of Pandering Advertisements in the Mails." Section 4009(a), which defines the scope of the statute, makes it applicable

solely to persons who are responsible for mailing "pandering advertisements." Thus, the plain purpose underlying Section 4009 was to prevent the receipt of sexually-related advertising that might force an offensive confrontation on unwilling citizens. *Ginzburg* v. *United States, supra* at 470; *Redrup* v. *New York, supra* at 769. See p. 17, *supra*.

Had Congress intended Section 4009 to serve a broader (and DMAA believes in the context of this type of regulation, an unconstitutional) purpose,—*i.e.*, to allow recipients to bar *any* unwanted mail from their homes—the term "pandering" would not have been employed.[11] In applying Section 4009 the Post Office has done what Congress failed to do: it has read the term "pandering" out of the statute.

2. The Addressee's Discretion Does Not Control the Characterization To Be Given the Advertisement.

Subsection (a) of Section 4009 provides:

> "Whoever . . . mails or causes to be mailed any pandering advertisement which offers for sale *matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative* shall be subject to an order of the Postmaster General to refrain from further mailings of such materials to designated addressees thereof." (emphasis added).

On its face this language indicates that the "sole discretion" afforded to the addressee by Section 4009(a) relates to whether the matter which is offered for sale, rather than the advertisement itself, is erotically

[11] Indeed, it was suggested in the hearings on Section 4009 that the term "pandering" should be removed if the statute were intended to apply to all mailed advertising. See p. 38, *infra*.

arousing or sexually provocative.[12] It thereby insures that the addressee cannot be compelled in subsequent administrative and judicial proceedings under the statute to justify his complaint against the matter offered for sale. Along the same lines, this provision in the statute may protect addressees from civil liability in lawsuits brought by outraged mailers for abuse of process or malicious prosecution.

Although subsection (a) standing alone is unambiguous, subsection (b) introduces considerable confusion by referring to the addressee's notice to the Post Office that "he has received such mail matter." Use of the word "received" implies that the advertisement itself is the referent for the addressee's discretion, but the use of the phrase "such mail matter" relates back to the reference in subsection (a) to the "matter" offered for sale, not the advertisement.

The Post Office has resolved these ambiguities in subsection (b) by applying Section 4009 to all mailed advertising. This renders subsection (a) virtually meaningless, for it has the effect of reading out of subsection (a) the term "pandering."

3. The Statute Does Not Bar Administrative or Judicial Review.

There is nothing in Section 4009 that prevents the Postmaster General from making an independent judgment as to whether a particular piece of mailed matter

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[12] An advertisement for material which is arousing or provocative is not per se a "pandering advertisement." For example, an arousing, and indeed an obscene book with an innocent title could be offerred for sale in a form resembling the so-called "tombstone" advertisements in the financial pages. Compare, President's Commission on Obscenity and Pornography, Progress Report, July, 1969, p. 19.

is a "pandering advertisement." It is true that subsection (b) states that the "Postmaster General shall issue an order, if requested by the addressee." However, subsection (d) provides that "if the Postmaster General . . . determines that the order given has been or is being violated, he is *authorized* to request the Attorney General to make application, and the Attorney General is *authorized* to make application, to a district court of the United States for an order directing compliance." (emphasis added). The term "authorized" was carefully chosen by the sponsor of the bill from which this portion of Section 4009 was taken verbatim to insure that the Postmaster General had discretion not to initiate enforcement action for those materials which he believed were not, in fact, "pandering advertisements." See pp. 33-34, *infra.* That being the case, it cannot be held that Congress in subsection (b) directed the Postmaster to serve Prohibitory Orders for all material complained of under the statute. Plainly, no purpose would be served by requiring the issuance of unenforceable orders against non-pandering materials; equally plainly such orders would have a needlessly chilling effect upon the use of the mails. See pp. 21-22, *supra.*

Finally, subsection (e) merely vests jurisdiction in federal district courts to order compliance, and neither in terms nor by implication states that those courts may not make the basic determination required by subsection (a) as to whether the Prohibitory Order which the court is asked to enforce is based on a genuinely "pandering advertisement." Thus, there is not that "persuasive reason" nor "clear and convincing evidence" that is necessary to overcome the strong presumption of judicial review as to the char-

acter of the advertisement. *Abbott Laboratories* v. *Gardner, supra* at 139-41.[13]

Accordingly, a reasonable construction of Section 4009 is that its sanctions do not apply to mailers of non-pandering advertisements and that administrative and judicial review is available to so limit the section's application. Certainly in view of the grave constitutional doubt that would surround Section 4009 if construed as applying to all mailed advertisements, it must be concluded that the statute does not speak with such clarity as to require that interpretation.

B. The Legislative History of Section 4009 Does Not Compel the Conclusion That the Statute Was Intended to Bar an Independent Determination of the Pandering Character of the Advertisement.

A review of the legislative history underlying Section 4009 reveals three salient facts:

(1) Congress was concerned with allowing recipients of mail to bar from their homes sexually-oriented mailed material that could cause an offensive confrontation and was not addressing itself to the quite different question of whether there could or should be some control over mail advertising in general.

(2) There was no congressional concensus that Section 4009 either barred or required the kind of admin-

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[13] Subsection (h) of the statute, which expressly makes Title 5, Chapter 7 of Part I of the United States Code inapplicable to Section 4009 proceedings does not manifest any congressional intent to limit judicial review in enforcement proceedings. That portion of the statute can be properly understood only as reading upon a mailer's right to originate judicial review of a Post Office Prohibitory Order; it in no way limits the defenses that a mailer can raise in a judicial enforcement proceeding originated by the Attorney General.

istrative and judicial review urged here; on the contrary, there was dispute on this point even among the drafters of the legislation.

(3) To the extent that some members of Congress believed that Section 4009 gave recipients of mail unreviewable discretion to bar any mailed advertisements from their homes, they considered that such discretion was necessary to preserve the constitutionality of Section 4009.

Since, as shown above, reviewability of the "pandering" character of the advertisement strengthens the statute's constitutionality, the desire of Congress to provide a constitutional means whereby genuinely "pandering advertisements" could be kept from unwilling recipients would be served by limiting Section 4009 to such materials. And certainly since such a construction of the statute is necessary to avoid doubts about its constitutionality, no valid congressional purpose prevents so limiting the statute.

Section 4009 originated in two separate bills introduced in the first session of the 90th Congress: H.R. 426, sponsored by Congressman Cunningham, and H.R. 8215, sponsored by Congressman Olsen. The comments of both Congressmen make clear that the sole purpose of their bills was to deal with sexually related materials that might cause offensive confrontations. Congressman Cunningham said, for example:

> "My proposal doesn't violate any constitutional provision. As a matter of fact, in the *Ginzburg* case, Ginzburg was convicted because of the advertising that was sent into the homes, millions of pieces, and that is what I am talking about—unsolicited advertising of this type." Hearings on H.R. 426 and H.R. 8215 before the Subcommittee

on Postal Operations of the Committee on Post Office and Civil Service, U.S. House of Representatives, 90th Cong., 1st Sess., p. 5 (1967) (hereafter "House Hearings").

Congressman Olsen had precisely the same intent:

> "This bill is rooted in the *Ginzburg* case . . . . Its aim is to protect my home and yours against unsolicited, unwanted pandering advertising . . . .
> "[I]t is about time that something is done to halt this infliction of sexual advertising upon a protesting and objecting population and the saturation of our children with sexual fantasy during their adolescence. House Hearings p. 10.

Congressmen Olsen and Cunningham also believed that their bills provided for an administrative determination within the Post Office Department as to whether or not a particular piece of mail complained of by an addressee was in fact sexually oriented in nature. The Olsen bill, which required a prior finding by the Postmaster General of the pandering character of materials, on its face provided for such an administrative determination. The Cunningham bill did not expressly provide for such a review and was opposed by the Post Office Department for that reason. House Hearings pp. 12-19, 61-63. However, Congressman Cunningham disagreed with the Post Office Department's interpretation of his bill:

> "Right at this time, I should point out that this is not the entirely antomatic legislation that passed the last two Congresses. The language reads that 'the Postmaster General, after appropriate hearings, if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the notice given is authorized.' This is not entirely automatic. The Post-

> master General can use his discretion. The Postmaster General has tools given to him by this bill to use in this field. If he doesn't think the mail matter is within the intent of Congress, he doesn't have to proceed. I hope that you will read that portion of my bill." House Hearings p. 18.[14]

Section 4009 as reported out of the House Committee was a combination of the Olsen and Cunningham bills in that subsections (a) and (b) adopted verbatim the corresponding provisions of the Olsen bill, but the provisions for enforcement relied upon the Cunningham bill's provision for injunctive actions brought by the Attorney General in United States District Courts. H. R. Rep. No. 722, Committee of the Whole House on the State of the Union, U.S. House of Representatives, 90th Cong., 1st Sess., p. 70 (1967). The Committee's report reflected the sentiments of Congressmen Cunningham and Olsen, stating that "this legis-

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[14] The language that Congressman Cunningham read from his bill does not correspond precisely with the language of that bill, in that the bill itself provided that the Postmaster General was "authorized" to request the Attorney General to make application to a district court if "the notice given under subsection (a) has been or is being violated." The disparity between the language as read in the record of the House hearings and the language as it appears in the bill may be due either to an error in transcription at the hearings or to Congressman Cunningham's error in reading the language of this bill into the record. However, the quotation above indicates that Congressman Cunningham placed primary reliance in interpreting his bill on the word "authorized" and believed that this provision gave the Postmaster discretion in enforcing the act. Since Section 4009 (d) embodies the same phrase as Congressman Cunningham's bill—"If the Post Master General . . . determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application . . . to a District Court of the United States . . . ."—Congressman Cunningham's intent with respect to administrative discretion in enforcing his bill is fully applicable to Section 4009 as passed.

lation is phrased in keeping with the *Ginzburg* case to cover only that advertising matter which is intended for commercial exploitation of sexually provocative matters." *Id.* at 69.

Subsections (a), (b), and (c) of Section 4009 as reported to the House were modified pursuant to an amendment offered on the floor by Congressman Waldie. Prior to the amendment, subsection (b) provided that "upon receipt of notice from an addressee that he has received mail matter, determined by the Postmaster General to be of the character of a pandering advertisement, the Postmaster General shall issue an order . . . ." Although the point was not developed in the House hearings, this provision was susceptible of a construction that it required a determination by the Postmaster General of the pandering character of particular advertisements *before* an addressee could complain about the receipt of such an advertisement. This construction of the statute would have presented problems of Post Office censorship akin to those involved in *Lamont* v. *Postmaster General, supra.*

It was Congressman Waldie's concern solely with the Post Office Department's possible censorship role that prompted his amendment; he did not suggest that his amendment was designed to limit judicial review:

> "Mr. Waldie . . . . My disagreement with the approach Mr. Cunningham has taken involves the fact that I believe it runs afoul of the First Amendment to the Constitution. He suggests that the Postmaster General must make a determination as to whether the literature and the materials concerning which he has received a complaint runs afoul of the Supreme Court decision concerning pandering. If he so determines, then the matter being sent through the mail can be prohibited.

> My amendment suggests that should not be the determination of the Postmaster General at all but a determination of the individual who receives the material." 113 Cong. Rec. 28660.

Congressman Cunningham rose to state that he had "no substantive argument" with Congressman Waldie's amendment, while at the same time making it clear that the section as so amended was intended to apply only to sexually-oriented materials. 113 Cong. Rec. 28660-61. There was very little other discussion of the Waldie amendment on the floor of the House, and it passed by a voice vote. 113 Cong. Rec. 28661.

The version of the bill (H.R. 7977) passed by the House was then considered by the Senate Post Office and Civil Service Committee and both Congressmen Cunningham and Waldie appeared to testify. Congressman Cunningham again made it absolutely clear that Section 4009, even after its amendment in the House, was intended to deal solely with sexually related materials. When asked whether he would favor extending the operation of Section 4009 to all third-class mail, Congressman Cunningham replied:

> "No, sir; I will absolutely not be in favor of that . . . .
>
> "The Chairman. . . . The point I am trying to make is I am trying to relate my right, having a box in my home, to what comes in it. If I would like not to get the mail from the loan sharks and from the dance lesson operators and all of these things that come in, would it not be possible to extend it? I think it might strengthen the bill to have a prohibition against this type of thing.
>
> "Mr. Cunningham. No, sir, I would be absolutely opposed to any such extension as that.
>
> * * *

"I see no connection between what I am trying to get across here and the House is trying to get across and what you have just mentioned.

"We are only narrowing it to the moral [sic], obscene, salacious, and sexually provocative mail that comes into our house, nothing else." Hearings on H.R. 7977 before the Committee on Post Office and Civil Service, U. S. Senate, 90th Cong., 1st Sess., pp. 523-24 (hereafter "Senate Hearings").

This testimony by Congressman Cunningham is particularly relevant to the legislative intent underlying Section 4009, because, as Congressman Waldie testified, Cunningham's acceptance of the section as amended was vital to its passage in the House:

"If he [Congressman Cunningham] had sought to oppose the amendment and had opposed it vigorously it would not have been adopted—it is that simple I believe—in the House." Senate Hearings p. 529.

Congressman Waldie, however, went far beyond the remarks he made on the floor of the House when introducing his amendment. He testified that an addressee could "if he is hung up on cabbage . . . prevent the weekly market circular from coming in his house if he is willing to say that cabbage has caused him to become sexually aroused * * * * and it particularly isn't governmentally appealable." Senate Hearings p. 526. Mr. Waldie said that his view was based upon his belief that the First Amendment would bar any review of an addressee's determination as to the character of any particular piece of mailed material. Senate Hearings p. 525.

Mr. Waldie was mistaken. The only First Amendment rights that can be infringed by Section 4009 are

the rights of mailers. Allowing mailers to have administrative and judicial review can only reduce constitutional doubt as to validity of the section. Indeed, other witnesses concluded that without such review significant First Amendment problems would arise—*e.g.*, representatives of the Justice Department and the American Bar Association. Senate Hearings p. 568 and pp. 595-98.

Thus there was conflicting testimony before the Senate Committee both as to whether Section 4009 was intended to be applied to matter other than genuinely pandering advertisements and as to its constitutionality if so applied. In this context, a suggestion was offered by the representative of the Justice Department that if Congress intended Section 4009 to cover non-pandering advertisements certain changes should be made in its language:

> "It [the caption] should no longer refer to pandering advertisements. Moreover, section (a) should be changed so that pandering is not the test that this man is asked to invoke.
>
> "The Chairman. If the bill were modified by striking the title language and striking on line 17, at page 47, the word 'pandering' and adding to the language, if we wish to make it absolutely certain to say 'or otherwise offensive to the recipient to refrain from further mailings.'
>
> "This would certainly make it definitive that the addressee would have the right to ask that mail of a certain nature whatever the cause, whether it was objectionable to him or not, not be delivered any more." Senate Hearings p. 575.

No action was taken on this suggestion, however, and Section 4009 was reported out of committee in precisely the form in which the House had passed it. Sen. Rep.

No. 801, Committee on Post Office and Civil Service, U.S. Senate, 90th Cong., 1st Sess., pp. 37-40 (1967).

The same divergence of views which characterized the testimony to the Senate Committee characterized the subsequent debate on the floor. Senator Monroney stated:

> "By no means do I think that anyone—I repeat, anyone—except the boxholder, in his home, has any control over what the latter considers objectionable . . . ." 113 Cong. Rec. 34231.

Senator Javits disagreed:

> "I believe that the courts will require that the material actually be erotically arousing or sexually provocative and will not let the matter go solely upon the fact that the addressee says it is." *Ibid.*

With these conflicting views as to the scope of review allowed under Section 4009 and the resultant breadth of the statute, the bill passed the Senate 85 to 2. Senator Javits voted for it because it was his "conviction that we are better off this way making the record very clear and posing the issue to the courts and leaving it to them to work out practically." 113 Cong. Rec. 34232.

To summarize: The legislative history of Section 4009 indicates that Congress was concerned solely with sexually provocative "pandering advertisements," and wanted to regulate their dissemination in a manner which would withstand constitutional challenge. On the other hand, that history is patently ambiguous with respect to whether a standard of reasonableness enforced by administrative and judicial review was to apply to that phrase. Under these circumstances, this Court is

free to adopt an interpretation of Section 4009 consistent with constitutional requirements. Indeed, in doing so it would be acting in accordance with Congress' obvious desire to find a constitutional method of regulating sexually provocative advertisements.

CONCLUSION

For the above reasons, this Court should hold that Section 4009 is applicable only to objectively determined "pandering advertisements" and that an independent review is available to enforce this limitation on the statute's scope. So interpreted, Section 4009 is not unconstitutional on its face and the action of the court below in refusing to enjoin its enforcement should be affirmed.

Respectfully submitted,

DAVID E. MCGIFFERT
E. EDWARD BRUCE
888 - 16th Street, N.W.
Washington, D. C. 20006
Attorneys for Direct Mail Advertising Association, Inc.

Of Counsel:

COVINGTON & BURLING
888 - 16th Street, N.W.
Washington, D. C. 20006

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 399

DANIEL ROWAN, d/b/a AMERICAN BOOK SERVICE, ET AL., APPELLANTS

v.

UNITED STATES POST OFFICE DEPARTMENT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinions of the three-judge district court (App. 58) are reported at 300 F. Supp. 1036.

JURISDICTION

The judgment of the district court was entered on June 18, 1969, "effective nunc pro tunc as of April 30, 1969." (App. 80.) The notice of appeal was filed on May 28, 1969 (App. 2). This Court noted probable jurisdiction on October 27, 1969. The jurisdiction of this Court rests on 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether 39 U.S.C. (Supp. IV) 4009, which allows unwilling recipients of offensive advertisements to prevent all further mailings from the sender to them and

their minor children living with them, abridges any right of free speech.

2. Whether Section 4009 is unconstitutionally vague, lacking in adequate standards, or overboard.

3. Whether the notice and hearing procedures of Section 4009 deprive mailers of due process of law.

STATUTES INVOLVED

The provisions of 39 U.S.C. 4009 are set out in the Appendix, pp. 53–55.

STATEMENT

Appellants are businessmen engaged in the mail order trade (App. 7). Some sell and distribute books and other materials through the mail; others buy and collate lists of names and addresses of persons who might wish to buy these materials and furnish these lists to mail order houses (*Ibid.*). They brought this action seeking to enjoin the operation of the anti-pandering statute, enacted as Title III of the Postal Revenue and Federal Salary Act of 1967, 81 Stat. 613, 645, 39 U.S.C. (Supp. IV) 4009. Appellants all claim to have received numerous prohibitory orders under the statute, directing them to refrain from any further mailings to designated addressees and to remove such addressees from the mailing lists in which they deal; a number are involved at various stages of administrative proceedings resulting from alleged failure to comply with such directives (App. 8). None complains that the Postmaster General has instituted enforcement proceedings against it, the necessary prerequisite to the only sanction provided by the statute. Appellants' attack on the statute is wide-ranging, including contentions that it abridges free speech, un-

lawfully delegates power, is void for vagueness, and deprives them of due process of law (App. 8–10).

THE STATUTORY FRAMEWORK

Action under Section 4009 begins when a person who has himself received, or whose children residing with him have received, "a pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative * * *," § 4009(a), complains to the Post Office Department. If the addressee so requests, "the Postmaster General shall issue an order * * * directing the sender and his agents or assigns to refrain from further mailings to the named addresses." § 4009(b). The order also directs the sender to delete the addressee's name from the sender's mailing lists and prohibits him from trading in lists from which the deletion has not been made. § 4009(c). Upon the request of the addressee, the order must include the names of minor children under the age of nineteen who reside with the addressee. § 4009(g).

No provision is made for immediate review or challenge of such an order, but its violation brings no sanctions. In the event of apparent violation, the Postmaster General "shall" begin an administrative proceeding by service of a complaint upon the sender. § 4009(d). The statute allows fifteen days for the sender to respond to the complaint and request an "appropriate hearing." § 4009(d). Regulations adopted pursuant to the Act require that testimony at the administrative hearing be under oath, be subject to cross-examination, and be recorded stenographically. 39

C.F.R. § 956.7 (App. 32). Detailed provisions are made for the taking of testimony, and submission of depositions and documentary evidence, objection to the admission of evidence, and other procedural matters. 39 C.F.R. §§ 956.7–956.9 (App. 32–34).

If the Department determines after this hearing or on default that the original order has been violated, the Postmaster General "is authorized to request the Attorney General" to apply to a United States District Court for an order directing compliance with the administrative order. § 4009(d). The Attorney General, in turn, is "authorized" to make such an application. *Ibid.* If he does so and if the district court issues an enforcement order, the sender then for the first time becomes subject to the possibility of sanction for his further acts: failure to obey the district court's order may be punished as contempt. § 4009(e). There is no provision for any other sanction, criminal or regulatory, in the act or in the regulations.

THE BACKGROUND OF THE LEGISLATION

Section 4009 grew out of the continuing congressional concern with use of the mails to distribute obscenity and, in particular, a rapid increase in the sending of unsolicited lewd and offensive advertisements through the mails, to both adults and children. It began as H.R. 426 and H.R. 8215, which were the subject of hearings before the Subcommittee on Postal Operations of the House Committee on the Post Office and the Civil Service, 90th Congress, First Session. (Hereinafter cited as *House Hearing*). These bills were carryovers from previous Congresses, in which

the House but not the Senate had enacted similar legislation. *House Hearing,* pt. I, p. 6. They were shaped by the knowledge that in five years the number of complaints received by the Post Office regarding lurid or indecent advertising had risen from 50,000 to 250,000 per year (*id.* at 1), and that perhaps twenty million pieces of such advertising were mailed annually. *House Hearing,* pt. II, p. 70.

It was not only that such mailings were offensive to adults to whom they might be mailed indiscriminately, *id.* at 63, 71; the committee also learned that, by design or otherwise, they frequently reached the hands of children, where they might have a substantial effect on emotional development. *Id.* at 41 (Dr. John Cavanagh); 54–56 (Dr. Joseph Slap); 73–75 (Dr. Jack Chernus); compare *Ginsberg* v. *New York,* 390 U.S. 629, 641–643 and n. 10. Indeed, the legislative history throughout shows a pervasive concern with the effect such advertising might have on children, and the importance of assisting parental control over the material children read. See, *e.g.* 113 Cong. Rec. 28660, 34231 (1967); H. Rep. No. 722, 90th Cong., 1st Sess. 68 (1967); Hearings on H.R. 7977 before the Senate Committee on Post Office and Civil Service, 90th Cong., 1st Sess., pp. 536, 547, 554 (1967) (hereinafter cited as *Senate Hearing*); *House Hearing,* pt. I, pp. 4–5, 9–10, 21; pt. II, pp. 48–50, 56–61, 62, 66. Because mail recipients are unable to ascertain the contents of their mail before they or their children open and confront it, Congress intended to safeguard the privacy

of what it found to be an essentially captive audience.[1] S. Rep. No. 801, 90th Cong., 1st Sess., p. 37 (1967); H. Rep. No. 722, 90th Cong., 1st Sess., p. 69 (1967); *Senate Hearing,* p. 542; *House Hearing,* pt. I, pp. 1, 11, 22, 26.

As noted, the House Committee considered two draft bills in its hearings. H.R. 426 differed in language, but was similar in effect to the section as ultimately enacted. It provided that anyone could return to the Postmaster General mail which he personally considered to be obscene, with a request that the sender be notified to send him no more. As under Section 4009, violations of this request led to administrative hearings, enforcement by court order and, on any further violations, contempt sanctions. *House Hearing,* pt. I, p.2. H.R. 8215, which had been drafted with Post Office assistance, introduced the notion of pandering, and the remedy of deletion of names from mailing lists; under this bill, however, the Postmaster General's order was final and subject to enforcement by stated criminal sanctions. Moreover, it was clear that the issue whether an advertisement was pandering or not was to be decided by the Postmaster General, not by the complaining recipient. *Id.* at 3.

[1] At all stages of congressional consideration, the intention to implement the wishes of unwilling recipients of offensive advertisements without affecting the general flow of communications was manifested in the clearest terms. As was stated in the House committee hearing:

"Adults who want to receive obscene material can receive it under this bill [H.R. 8215]; but a free society does not compel people to receive sexually provocative material, it does not compel them to be part of a captive audience." [*House Hearing,* pt. I, p. 11 (remarks of Rep. Olsen)].

The bill as reported by the Committee was an amalgam of these two provisions. It adopted the "pandering" orientation of H.R. 8215, and the contempt enforcement mechanism of H.R. 426. It required an administrative determination by the Postmaster General that the particular mailing piece came within the proscribed class of pandering advertisements, "as that term is used in the *Ginzburg* case," H. Rep. No. 722, *supra,* p. 69, and included as part of its remedy the mailing list provisions now part of Section 4009; the only future mailings prohibited, however, were mailings of more "pandering advertisements" to the complaining addressee. *Id.* at 69–70, 125–126. Other items could be sent.

The bill was amended on the floor of the House by Congressman Waldie, who had already made plain in Committee his view that the Post Office belonged out of the censorship business, and that the addressee alone should decide what advertisements he considered fit to receive. *House Hearing,* pt. I, 13–14, 16–17, 25–26. The amendment he offered brought the bill into its present form, making the question of the sexual nature of advertising a matter "in [the] sole discretion" of the addressee, and providing for an order directing the sender to refrain from making "*any* further mailings to the designated addressees." In explanation, he stated:

> * * * My amendment suggests that should not be a determination of the Postmaster General at all but a determination of the individual who receives the material. The standards of conduct that I enforce in my particular house-

hold are not those that the Supreme Court has laid down in terms of materials that are available for my children's consumption. I am the supreme court in the particular household in which my children reside, and there is no appeal from that determination. So I have said in my amendment that if you receive literature in your household that you consider objectionable for the reasons Mr. CUNNINGHAM states, then in your sole discretion you can inform the Postmaster General to have your name stricken from that mailer's mailing list. If he does not do so, he violates that order, *and the only determination left for the discretion of the Postmaster General, is did he or did he not remove your name from the mailing list.* Then you are able to prevent that man from making any further mailings to you, but *the sole determination as to whether the literature you receive is objectionable or not is within your discretion and you are not second-guessed on that discretion.*

The bill that is before us severely limits your right to refrain from receiving objectionable material, because you must then refrain from receiving only material from the shipper that the Supreme Court has held to be objectionable. I suggest that the standards you may desire for your children and the standards that I desire for my children are far more strict than the standards that the Supreme Court has set in terms of controlling governmental censorship. *By removing from this section, the right of the Government to involve itself in any determination of the content and nature of these objectionable materials precludes the first*

> *amendment from having any application whatsoever.* [43 Cong. Rec. 28660 (1967); emphasis supplied].

There was substantially no opposition to the amendment.

The bill was not changed from this point forward; its legislative history is dominated by the two themes Congressman Waldie introduced—complete discretion on the part of an addressee to identify advertisements he found objectionable, and a complete cessation of mail from that sender, in both instances to avoid administrative and constitutional problems which were perceived to be of the first order. *E.g., Senate Hearings,* 544, 548, 554. Although Congressman Cunningham, testifying in the Senate Hearings, stressed the limitation to pandering materials, *id.* at 523–525,[2] the members of the Senate Committee were aware of Congressman Waldie's purpose even before he addressed them. *Ibid.; id.* at 525–534. Indeed, on occasion, the bill was treated as if the addressee's statement that he found mail advertising sexually offensive were no more than a ritual incantation which he could make as to any advertising matter he no longer cared to receive, without check. *E.g., id.* at 528, 557–558, 567, 569–571. The Senate Committee Report on the bill, No. 801, *supra,* summarized the understanding evident throughout:

> * * * All the witnesses who testified before this committee agreed that the broader the coverage and the wider the extension to all types and classes of mail, the more solid was the constitutional foundation for the preventive procedure contained in the provision.

[2] Congressman Cunningham assured the committee that he had not opposed the Waldie amendment. *Id.* at 529.

> Under the provisions contained in title III, *the individual citizen is made the sole judge* of whether any advertisement he receives is a pandering advertisement; that is, one that offers for sale matter that to him is erotically arousing or sexually provocative * * *.
>
> If a person receives an advertisement which contains an offer to sell matter which he, in his sole discretion, believes to be erotically arousing or sexually provocative, he may notify the Postmaster General of his determination. The Postmaster General is then *required* to issue an order to the sender directing him to refrain from sending *any further mailings of any kind* to such person. * * *
>
> The committee believes the provisions of title III treat equally important, although sometimes conflicting, rights guaranteed by the Constitution in as fair and equitable a manner as possible. The Government should not restrict the right of free speech. At the same time, it should not act as the instrumentality by which unwanted and unsolicited mail matter is forced upon an unwilling citizen. * * * [At 38; emphasis added].

On the floor of the Senate, both during the initial debates and after a Conference Report, Senator Javits, in an explicit effort to make legislative history, stated that he believed there could be a *judicial* determination of the pandering quality *vel non* of objected-to advertising matter before an order of the Postmaster General was enforced.[3] 113 Cong. Rec.

[3] Senator Javits made no effort, however, to suggest that the Post Office had any role in judging the nature of objected-to advertising matter. Conceding that "the bill requires no find-

34230-34232, 36105. Senator Monroney, chairman of the reporting committee and manager of the bill on the floor, refused to be moved from his view, for the committee, that—

> the right of privacy provided a homeowner by the Fourth Amendment was controlling; that we have a right to mail this matter to him, but cannot repeatedly do so if the man finds it objectionable and, in the language of the bill, determines it is erotically arousing or sexually provocative. This is the language we put in the bill. *By no means do I think that anyone—I repeat, anyone—except the boxholder, in his home, has any control over what the latter considers objectionable.* He could go to the postmaster and say, "This is objectionable to me because of it being erotically stimulating," and so forth. *It does not have to be.* He can say, "Cabbage incites me, and I do not want any more cabbage direct mail delivered to my home." *I believe that the court would find, under the language of the bill, that he is the sole judge;* and the processes set forth by this amendment, which is identical to that of the House, would be that *no one could question his right of privacy because he objects to this type of mail coming from the sender.* He protests, so the sender is notified, and then the provisions of the bill go into operation, as ably described by the Senator. [At 34231; emphasis added.]

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ing," at 34230, he felt that if an *administrative* finding were required, "it would erect such a complicated structure of hearings, and determinations and trial examiners, and so forth—it would invite bureaucracy and litigation—that the practical aspects of the matter would be better handled by leaving the matter to the courts * * *." At 34231.

> The primary enforcement power is with the recipient of pornographic advertisements and material. All he need do is to say that the material is pornographic, in his judgment, and the Postmaster General must act to notify the mailer to take this man's name off that list and to never send any more mail to him. [At 36105.]

There was no other discussion of the provision.

ADMINISTRATIVE CONSTRUCTION OF THE STATUTE

The Post Office Department has taken a view of its role under the statute which draws on the congruity between Congressman Waldie's view of his amendment and the views expressed by the Senate Committee and its chairman and floor manager. While the rules of practice the Department has adopted to govern Section 4009 proceedings do not state what shall be the subject matter of administrative hearings or the sweep of the remedial order issued at its conclusion, it has published a pamphlet for public distribution and an administrative guide, both reprinted in the Appendix, *infra*, pp. 56–65 and 66–68, which show its views on these issues. In its first two paragraphs, the pamphlet states that—

> A family receiving a pandering advertisement which it finds offensive has authority under a new Federal law to ask that its members receive no more mail of any kind from the sender. * * *
>
> The individual mail patron is the sole judge of whether an advertisement is offensive to him. * * * [App., *infra*, p. 66.]

The administrative guide is as explicit:

> When determined that the patron [has submitted all necessary materials and requests for action], the mailing which the patron has characterized as a pandering advertisement must be examined to determine if it is, in fact an advertisement. It is important to emphasize, at this point, that the only question to be determined by the services center with respect to the offending mail piece is whether it constitutes an advertisement. The Department has no authority to review or question the patron's decision that the subject matter of the offending mail piece is erotically arousing or sexually provocative.
>
> * * * * *
>
> The Prohibitory Order issued under section 4009 * * * will direct the mailer of the pandering advertisement, effective thirty calendar days after the mailer's receipt of the Order, to make no further mailings of any kind to the persons protected by the Order. As stated, this prohibition extends to any and every type mailing, not just future pandering advertisements. [App., *infra,* pp. 59–60, 61–62.]

The prohibitory order forbids "any further mailings," without limitation. Appellants' Br., Exh. A.

Thus, in the Department's view, the only questions open for examination at the hearing provided for in the statute and regulations are: whether the mailing initially received and objected to was an "advertisement"; whether the objection was made in a proper form; and whether any mailing was made to the proscribed address (or whether any list bearing the

addressee's name was dealt in) after the effective date of the Department's order. While the Department has consistently stressed in its public statements regarding the scope of the law the connection with pandering and the requirement that the patron make a determination that sexual offensiveness is involved, it does not undertake to examine the bona fides of an objection once made. Accordingly, it has been possible for postal patrons to secure prohibitory orders against mail advertisers whose offerings they may not in fact have regarded as "erotically arousing or sexually provocative." It appears, however, that the *bona fides* of the great bulk of the complainants could not be questioned.

As of November 1, 1969, 368,868 requests for prohibitory orders had been received by the Post Office Department, and 291,340 orders issued, since inception of the statutory scheme.

JUDICIAL INTERPRETATION OF THE STATUTE

As of December 31, 1969, 2,121 complaints under the statute were pending in United States District Court, and 13 complaints had been acted on, almost entirely on default in favor of the government. No action has yet been filed against an advertiser whose materials could not reasonably be thought to be pandering within the statutory contemplation, although that is a matter of continuing discussions with the agency. All judicial orders entered to date have barred the sender from "any further mailings" to the recipients concerned, but no contempt proceedings have yet been brought to test the scope of that ban.

The only effort at judicial construction of the statute is that made by the court below in denying the requested injunctive relief. That court—a three-judge court in view of appellants' constitutional attack and effort to secure injunctive relief against the statute's operation, 28 U.S.C. 2284—divided in its reading of the statute.

Although they did not address the question directly, the majority appear to have read the statute's repeated reference to the "sole discretion" of the addressee as foreclosing any review function by the administrator or the courts over an addressee's determination that what he had received was a "pandering advertisement." The majority concluded, however, that the statute did not bar all future mailings, but only mailings of materials similar to those to which objection had been made. Once the addressee had determined what he found objectionable, it held, "all other proposed mailings are to be measured by the objectionable material of such first mailing" (App. 66–67). So read, the majority held that Section 4009 merely implemented the right of an individual to choose his own reading material and maintain "his own personal sensitivity and concept of privacy." (App. 64). Noting the elaborate procedural machinery established by the statute, the court rejected appellants' contention that Section 4009 deprived them of procedural due process. It dismissed appellants' argument that the expense of removing unwilling addressees' names from mailing lists rendered the statute confiscatory, and it found no unconstitutional delegation of power to addressees, since the discretion

conferred on them extends only to their own mail. The court also held that the statute was neither vague nor ambiguous, but gave ample warning to the sender of what he is prohibited from mailing to specified addressees. Finally, the district court concluded that injunctive relief would be inappropriate in any event, because appellants could show neither irreparable damage nor inadequacy of their remedies under the statutory procedure. Deciding that Section 4009 is constitutional and "provides an adequate forum" in which to litigate all of the issues of this controversy (App. 68), the district court dismissed the action.

The concurring judge was principally concerned that serious First Amendment problems might arise out of unfettered discretion on the part of addressees to insist upon not receiving mail from particular senders. In order to limit the statute to what she perceived as its purpose—enabling recipients to turn off the flow of *objectively* pandering commercial advertisements—she read a limitation into the district court's enforcement power. Although, in her view, the Postmaster General was required to do "no more than locate the sender and send to him the notice written by Congress" and then choose whether to seek enforcement of the order if violated (App. 76), a district court could not enforce the order unless shown that the matter complained of was "a commercial solicitation bearing on its face textual or graphic matter designed to appeal solely to the erotic interest of the addressee" (App. 77). She agreed with the majority that violation of that order could be committed only by the subsequent sending of similar materials

(App. 77–78). She found the act, so construed, constitutional.

SUMMARY OF ARGUMENT

The language of Section 4009, its legislative history, and its administrative interpretation all point to a construction considerably broader than that given it in the opinions below. Congress intended to confer, and effectively did confer, complete discretion on recipients of mail advertising to declare such advertising objectionable as "erotically arousing or sexually provocative" and to secure administrative and, if necessary, judicial relief against any further mailings of any kind to them by the sender. It did so to avoid what it perceived as serious constitutional objections to any effort by the Post Office to determine whether mail was or was not of the character described and, further, to get the Post Office out of the consorship business. The restriction against *any* further mailings was adopted, not only in view of the difficulty of determining whether subsequent mailings were of the same character as those which an addressee had formerly found objectionable, but also to avoid any appearance of prior restraint of particular ideas; the government was only enforcing the wish of the particular addressee to be free of further intrusions on his privacy by a sender whose advertisements he had once found objectionable. Thus construed the statute infringes no constitutional right of appellants.

The contention that the First Amendment requires judicial and administrative review of an addressee's determination that he has received a pandering adver-

tisement is answered, we believe, by the commercial context of the mailing involved and by the fact that the addressee blocks the mail only to his own home. It is well established that purely commercial advertising is subject to forms of regulation which might otherwise be forbidden by the First Amendment. In particular, "the exigencies of trade are not ordinarily expected to have a higher rating constitutionally than the tranquillity of the fireside." *Breard* v. *Alexandria*, 341 U.S. 622, 627. There is no question but that appellants' material is of a purely commercial nature. Congress properly determined that, as to such material, a recipient's right to refuse to have it delivered to his house outweighs any First Amendment interest of the sender in imposing it upon him. That judgment is particularly apt in the present context, where the advertisements involved are offensive, where their offensiveness cannot be discovered and avoided prior to their inspection, and where children may reach the material first, before their parents can screen it from them.

Since the individual is empowered to determine only what enters his own mail box, and in view of the recognized complexity of any objective test of obscenity or pandering, Congress was well within constitutional bounds in enabling the recipient to judge for himself what matter offends his sensibility. Should the Court fear, however, that the statute makes it too easy for individuals to interfere with commercial mail which is not, even in their eyes, pandering in nature, we suggest that that possibility can be guarded against without the need for administrative or judicial determination of pandering. It would be sufficient to re-

quire that an inquiry be made, preferably at the judicial level, into the good faith of an addressee's claim that the mail he objected to offended him for the reasons set out in the statute. Such a construction would curb misuse of the statute, without requiring the judicial and administrative proceedings, and the second guessing of recipient tastes, which Congress so clearly wished to avoid.

Nor do we think the prohibition on further mailings must be limited to mailings which are pandering in fact, or which are similar to those which first gave a recipient offense. Any ban on a commercial mailer's further mailings to a particular address will in practice result in a cessation of all further mailings—at least those mailings for which lists are used—rather than the inception of a discretionary selection process. This fact, and the substantial administrative conveniences involved, together justify the sweeping ban. Again, it is important that what is involved is the voluntary statement of one recipient that he does not wish to receive mail again from a particular sender. There is no general ban of any kind. If a narrowing construction is nonetheless necessary, we believe all legitimate objections would be answered, and the congressional purpose least disserved, by a limitation of the prohibition on further mailings to those which advertise matter for sale.

In response to petitioner's further contentions, we show that the requirement that a sender delete the names of complaining addressees from all his mailing lists effectuates the further mailing provisions and denies no constitutional right; and that Section 4009

provides for procedures which comport with due process of law.

Even should this Court find constitutional doubts which compel it to a construction of the statute narrower than we have urged, we stress our view of the statute's history that, whatever else might be required, to construe the statute as involving an *administrative* determination of pandering or a test of permissible further mailings which would depend upon the material initially found objectionable, would be an unacceptable reworking of the statutory scheme.

ARGUMENT

I. THE STATUTE SHOULD BE CONSTRUED TO FORECLOSE ANY FURTHER MAILINGS BY A SENDER TO AN ADDRESSEE WHO HAS ONCE ASKED THAT MAILINGS TO HIM BE CEASED AFTER RECEIVING AN ADVERTISEMENT WHICH HE BELIEVES TO HAVE OFFERED MATERIAL OF A SALACIOUS NATURE

The legislative history set out above makes clear the view both of the author of Section 4009 and of the Senate Committee which carefully studied it that the section makes the individual receiving mail "the sole judge whether any advertisement he receives is a pandering advertisement," and then requires the sender "to refrain from sending any further mailings of any kind to such person."[4] S. Rep. No. 801, *supra,*

[4] The government's Motion to Affirm, perforce, accepted the construction of the court below that only future mailings of "pandering advertisements" were prohibited. At 4, 8, 9. In view of the administrative difficulties of that limitation in the context of discretionary, individual determinations of what

p. 38. Indeed, in the limited floor debate in the Senate, Senator Javits, the only vocal critic of the provision, readily conceded that this was the thrust of the legislation, and that the Post Office should not be burdened with administrative determinations of any kind regarding the pandering quality of initial or subsequent mailings, 113 Cong. Rec. 34231. He simply expressed the view that when the time came for judicial enforcement or the application of contempt sanctions, attention might *then* be paid to whether or not pandering had occurred. *Ibid.; id.* at 36105. In the House, Congressman Waldie made clear that under his amendment the addressee complaining of mailed advertisements was not to be "second-guessed," and that his complaint would "prevent that man from making any further mailings." *Id.* at 28660. His amendment was adopted without change; he never retracted that view.

As so often happens in the process of amendment, however, minor ambiguities were left in the statute. Section 4009(a) refers to a "*pandering* advertisement which offers for sale matter which the addressee

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constitute pandering advertisements, and in light of the conclusion reached on further study of the legislative history that Congress virtually foreclosed even judicial determination of that question, the government has concluded that it can no longer advance that limitation as part of its primary argument. It would be appropriate only if this Court determined that judicial review of the pandering issue were required—a limitation which, for the reasons set out in the text, pp. 37–41 and 50–52, we are most reluctant to accept. The government opposed limitation of the "further mailings" language in the court below. *E.g.*, App. 45. It does concede, *infra*, p. 45, the possibility of a limitation to further mailings of *advertisements*, whatever their nature.

in his sole discretion believes to be erotically arousing or sexually provocative," and it might be argued that the qualifying clause does not govern the word "pandering"—that is, that "pandering" as much as "advertisement" constitutes an element which must be administratively determined before an order can be issued. Similarly, although Section 4009(b) forbids "further mailings" and 4009(c) "any further mailings" to an addressee under an order, Section 4009(a) states that the sender "shall be subject to an order * * * to refrain from further mailings of such materials * * *." From this it might be argued that only mailings of materials such as the addressee has determined to be pandering are forbidden. Yet either argument, if accepted, would appear to require the very same administrative proceedings which the legislative history shows beyond doubt Congress wished to avoid. As we now show in some detail, both arguments should be rejected.

A. "PANDERING ADVERTISEMENT"

In adopting the Waldie amendment, the House chose against the reported bill, which would have required the Postmaster General to determine whether a particular mail item was "of the character of a pandering advertisement" before issuing any order. H. Rep. No. 722, *supra,* at 69. In the Senate, critic and sponsor alike agreed that "the bill requires no finding on the part of either the Postmaster General or the court that the material is actually 'erotically arousing or sexually provocative'," and that it would be impractical and undesirable to import any element of Post Office censorship into it. 113 Cong. Rec.

34230–34231. The statute itself repeats the reference to "sole discretion" in Section 4009(b) without a separate mention of pandering. It could not be clearer that, in congressional contemplation, the individual was made "the sole judge of whether any advertisement he receives is a pandering advertisement." S. Rep. 801, *supra,* p 38.

Indeed, if the statute were read to require an administrative determination of pandering, that would substantially defeat the "sole discretion" conferred on addressees by the following clause. For the term "pandering" itself connotes sexual elements, see *Ginzburg* v. *United States,* 383 U.S. 463; were the administrator to determine "pandering" this would involve him in the very type of censorship proceedings Congress wished to avoid—as well as in bureaucracy and litigation which would be crushing in view of the volume of orders sought. No such self-defeating interpretation is required. As in fact is done under the Post Office Administrative Guide, *supra,* p. 13, the word can be read as underlining the commercial context in which the solicitation must take place to be objectionable under the statute. So read, the statute avoids internal inconsistencies and carries out the congressional purpose.

To be sure, Congress was concerned with offensive sex-related materials when it enacted Section 4009. But Congress understood that individual tastes and judgments would differ on such questions, that one

man's salaciousness might be another's sustenance. The intention was to allow scope for these differences of background and taste to express themselves. See, *e.g., Senate Hearing,* p. 548. In keeping with the individualized remedy of Section 4009, Congress sought to prevent postal officials from sitting "astride the flow of mail * * *." *Lamont* v. *Postmaster General,* 381 U.S. 301, 306. It knew that some addressees might exercise their discretion perversely or unreasonably to screen out materials having scant relation to sexuality. Cf. 113 Cong. Rec. 28659–28661, 34231 (1967); *Senate Hearing,* pp. 525–528. It was even suggested that conferring sole discretion on the addressee risked abuses that might affect the efficiency of the Post Office. *Senate Hearing,* p. 558. But Congress preferred to take the chance that some addressees would reject mail matter falling outside the narrow ambit of the legislative purpose than to adopt a scheme that would involve local postal officials in reviewing addressees' determinations of what did and did not intrude upon their privacy. It chose what it judged to be a less restrictive, less uncertain and less bureaucratic alternative.[5]

[5] Even after the sole discretion amendment had passed the House, there were still proposals that more comprehensive schemes of regulation be adopted. It was, for example, suggested that a more effective way of handling the problem would be to institute a system of licensing of mailing list brokers, including license revocation for those brokers who sell their lists to dealers in pandering materials. Testifying before the Senate committee considering the bill, Congressman Waldie conceded that such a scheme would probably be more effective than

B. "ANY FURTHER MAILINGS"

Like the sole discretion provision, the "further mailing" provision was amended on the floor of the House. The original bill reported by the House committee prohibited "further mailings of such pandering advertisements" in Section 4009(a), "further mailings of such matter" in Section 4009(b), and "any further mailings of pandering advertisements" in Section 4009(c). H. Rep. No. 722, 90th Cong., 1st Sess., pp. 125–126 (1967). The floor amendments which were adopted modified those subsections in the following way. Section 4009(a) now speaks of "further mailings of such materials," Section 4009(b) of "further mailings", and Section 4009(c) of "any further mailings." The explicit intention of the author of these amendments, Congressman Waldie, was "to prevent that man [the sender] from making any further mailings to you * * *." 113 Cong. Rec. 28660 (1967). Undoubtedly, these amendments were intended to harmonize better with the sole discretion provision than the original language would have, for Congressman Waldie added: "but the sole determination as to whether the literature you receive is objectionable or

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the individual remedy afforded by Section 4009, but he stressed the constitutional problems presented by such an approach:

"* * * I think every objection you point out as to the difficulty of enforcing this is a proper one, but it seems to me at least the only method that has been presented to the Congress that does not get into first amendment questions and, as awkward and inefficient as it might be, it offers at least an opportunity to determine whether it will work."

Senate Hearing, p. 533, see *id.*, pp. 532–534. For other alternative schemes, rejected for similar reasons, see *id.*, p. 522; *House Hearing*, pt. I, p. 8.

not is within your discretion and you are not second-guessed on that discretion." *Ibid.*

The seeming conflict between the present subsection (a) and subsections (b) and (c) is merely a residue of the earlier wording. Subsection (a) was not intended to permit any subsequent inquiry into whether mailings which occurred after the effective date of the prohibitory order were similar in kind to the initial offensive mailing. The Senate committee which considered the bill after it had been amended and passed by the House understood that the statute was intended to prohibit, in the committee's words, "any further mailings of any kind" to a complaining addressee. S. Rep. No. 801, 90th Cong., 1st Sess., p. 38 (1967).

The relationship between the "further mailings" problem and the "pandering advertisement" must also be borne in mind. For if, as we have shown, the determination whether an advertisement is pandering or not rests solely with the recipient of the mail, a construction of "further mailings" to apply only to similar materials would make enforcement proceedings bizarre. There would then be no rational way to decide whether further mailings had the same vice as had led the recipient to object initially.

> If a mailer were prohibited only from sending materials the addressee regarded as offensive, the mailer would be confronted with an impossible standard—the totally subjective and nonreviewable standard of the addressee. It would be impossible for the mailer to guess the subjective feelings of the addressee. Under the prohibition provided in title III [*i.e.*, Section

4009], the mailer has no such problem. He simply knows he can't send anything at all to that addressee.

Senate Hearing, p. 545 (testimony of Timothy J. May, General Counsel, Post Office Department). And again, the necessity for such determinations would require the creation and funding of an elaborate administrative machinery which Congress never meant to establish. Quite the contrary: Congress expressly preferred the clarity and simplicity of the present procedure to a burdensome scheme of administrative censorship. Under the Post Office interpretation of Section 4009, *any* further material sent to the complaining addressee, thirty days or more after receipt of the order by the sender, violates that order. The order is plain, enforcement is uncomplicated, and the issues at the hearing (if any) are clearcut.

Finally, Congress must have understood that in practice a prohibition only of similar mailings would in fact operate as a prohibition of all further mailings. This point may be illustrated by the affidavit of the appellant LeJay Winkler, d/b/a Quality Products (App. 22–25). Since Section 4009 became effective, Quality Products has rented 111 mailing lists, with a total of 410,345 names, and has received approximately 1,000 prohibitory orders under the act (App. 22). Quite obviously, the only practical way for Mr. Winkler and Quality Products to proceed is to excise the approximately 1,000 names involved from all further mailings, by deleting the names from his lists. He simply cannot make 1,000 individualized determinations, for each of his future mailings, as to whether it

is or is not "similar" to the mailing that prompted the individual addressee to request a prohibitory order. Appellants have never suggested a limiting construction of the "further mailings" provision; and with the limited exception noted within, p. 45, any such construction would make no practical sense.

II. THE FIRST AMENDMENT DOES NOT REQUIRE JUDICIAL OR ADMINISTRATIVE REVIEW OF AN ADDRESSEE'S GOOD FAITH DETERMINATION THAT A COMMERCIAL ADVERTISEMENT HE RECEIVES THROUGH THE MAIL OFFERS FOR SALE "EROTICALLY AROUSING OR SEXUALLY PROVOCATIVE" MATTER

A. PURELY COMMERCIAL ADVERTISEMENTS, OF WHATEVER NATURE, ARE SUBJECT TO FORMS OF REGULATION WHICH MIGHT OTHERWISE BE FORBIDDEN BY THE FIRST AMENDMENT

No prohibitory order may issue under section 4009 unless there is a request from an addressee who has received a "pandering *advertisement which offers for sale* matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative * * *." § 4009(a) (emphasis supplied). For the reasons already shown, Congress granted the addressee sole discretion to judge the offensiveness of the advertisement and the matter it offered for sale, including the issue of "pandering." But whether there has been an advertisement offering matter for sale is an objective question, which the postal authorities are granted power to decide and do decide before any order is issued. *Supra*, p. 13. The statute thus applies only when there has in fact been a commercial solicitation. It does not apply to the mailing of books, pam-

phlets, pictures or other traditionally protected written materials. Nor does it apply to political or religious tracts, even if they are accompanied by a request for a donation.

It is well established that "purely commercial advertising" is subject to forms of regulation which might otherwise be forbidden by the First Amendment. *Valentine* v. *Chrestensen,* 316 U.S. 52, 54. See *Breard* v. *Alexandria,* 341 U.S. 622, 641–642; *Ginzburg* v. *United States,* 383 U.S. 463, 474, n. 17. Of course, we do not content that the First Amendment can have no application whatever to advertising. Advertising may be a means of editorializing, *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 265–266, or of proselytizing, *Jamison* v. *Texas,* 318 U.S. 413, 416–417, and in such circumstances it would be constitutionally protected. But there is no suggestion either that appellants' material falls into those categories or that an advertisement that merely advocates an idea would be within the purview of the act, since only an offer of sale may bring on a prohibitory order. The appellants are businessmen, not political, social or religious pamphleteers. Whereas it is important to protect the latter in seeking out determined opponents of their views for the purpose of persuasion, commercial vendors are more likely to continue their offensive solicitations only because of the inconvenience or cost of removing the names of

those who have objected to their materials from their lists.[6]

It is precisely this unconcern for the sensibilities of recipients that Congress sought to mitigate when it enacted Section 4009. The distinction between protected speech and purely commercial advertising is particularly compelling under these circumstances. For "the exigencies of trade are not ordinarily expected to have a higher rating constitutionally than the tranquillity of the fireside * * *." *Breard* v. *Alexandria,* 341 U.S. 622, 627. "[O]pportunists, for private gain, cannot be permitted to arm themselves with an acceptable principle, such as * * * a free press, and proceed to use it as an iron standard to smooth their path by crushing the living rights of others to privacy and repose." *Id.* at 625–626.

B. CONGRESS PROPERLY DETERMINED THAT, IN THE CONTEXT OF PURELY COMMERCIAL ADVERTISING, A RECIPIENT'S RIGHT TO REFUSE MATTERS HE DOES NOT WISH DELIVERED TO HIS HOME OUTWEIGHS ANY FIRST AMENDMENT INTERESTS OF A SENDER IN IMPOSING THOSE MATTERS UPON HIM

The history of Section 4009 makes plain that Congress was engaging in a deliberate balancing of mail recipients' interests in privacy from unwanted mail against mail senders' interests in imposing that mail upon them. Acting to effectuate "the right to be let

[6] Congress was aware of the difficulty that addressees frequently experience when they attempt to have their names removed from mailing lists of purveyors of undesirable material. See, *e.g.*, *Senate Hearing*, pp. 516–517; *House Hearing*, pt. II, p. 71. As their affidavits indicate (App. 17–25, 36–38), appellants here are primarily concerned with avoiding the expense of deleting names of complaining addressees from their lists.

alone—the most comprehensive of rights and the right most valued by civilized men," *Olmstead* v. *United States,* 277 U.S. 438, 478 (Brandeis, J., dissenting), those who prevailed believed that, in this commercial context, the interests of recipients outweighed those of senders without any need to impose a further objective safeguard on the types of materials to which objection was made. *E.g.,* 113 Cong. Rec. 34231–34232, 36105; S. Rep. No. 801, *supra,* at 38. That assessment was correct.

In making the assessment, Congress was of course aware that the freedoms of speech and press embrace the rights necessary to effectuate those freedoms, including the right to circulate and receive publications, the right to listen and the right to read. *Stanley* v. *Georgia,* 394 U.S. 557, 564; *Martin* v. *City of Struthers,* 319 U.S. 141, 143; *Ex parte Jackson,* 96 U.S. 727, 733; *Lamont* v. *Postmaster General,* 381 U.S. 301, 308 (Brennan, J., concurring). But it also recognized that "[w]hen expression occurs in a setting where the capacity to make a choice is absent, government regulation of that expression may co-exist with and even implement First Amendment guarantees." *Ginsberg* v. *New York,* 390 U.S. 629, 649 (Stewart, J., concurring). One's interest in being let alone is greatest in "the privacy of one's own home." *Stanley* v. *Georgia,* 394 U.S. 557, 565. Accordingly, Congress sought to insure that no one need be subjected to unwanted vulgarities in his mailbox.

The freedoms secured by the First Amendment do not guarantee the writer or speaker a willing recipient, a friendly audience or a receptive reader. *Schneider*

v. *State,* 308 U.S. 147, 160. This Court has never questioned the right of a person in his own home to decide what not to listen to and what not to read. On the contrary, while zealously protecting the right to speak, this Court has also been solicitous of those who prefer not to listen. Thus, in *Kovacs* v. *Cooper,* 336 U.S. 77, a local ordinance forbidding the use of amplifiers emitting "loud and raucous noises" on the public streets was sustained, on the ground that it protected the "unwilling listener" who at "home or on the street * * * is practically helpless to escape this interference with his privacy * * *." 336 U.S. at 86–87. Similarly, in *Breard* v. *Alexandria,* 341 U.S. 622, this Court upheld an ordinance prohibiting uninvited door-to-door solicitation of magazine subscriptions on the ground that it was designed to protect residents against uninvited intrusions into the privacy of their homes. 341 U.S. at 625.

To be sure, there are limits on the right of a legislature to safeguard the privacy of all despite the wishes of some who might prefer to hear the speaker's message at their door. See *Martin* v. *City of Struthers,* 319 U.S. 141, and the dissenting opinion in *Breard,* 341 U.S. at 649–650. But *Martin* and *Breard* both make it clear that a statute may, without offending the First Amendment, forbit solicitation which the homeowner or resident has refused in advance.[7]

[7] Thus, the opinion of the Court in *Martin* stated that "the decision as to whether distributers of literature may lawfully call at a home" must be left "where it belongs—with the homeowner himself. A city can punish those who call at a home in defiance of the previously expressed will of the occupant * * *." 319 U.S. at 148.

Section 4009 does not go as far as the ordinance sustained in *Breard*. It makes no decisions for the community at large. It only permits individual mail recipients to choose their and their children's reading matter and enforces their decisions to receive nothing more from a particular sender who has mailed them advertisements which they find as individuals to be pandering materials which are "erotically arousing or sexually provocative." As this Court suggested in *Martin*, Section 4009 leaves the decision to accept or reject the material "with the homeowner himself." 319 U.S. at 148.

The infringement of privacy associated with advertisements which recipients perceive as pandering goes beyond the "nuisance, or worse, to peace and quiet" found in *Breard*. 341 U.S. at 627. Besides the effect of such publications on the young, Congress found that such advertisements—tasteless at best, obscene at worst—had often proved extremely upsetting to recipients. (See *supra*, pp. 5–6). And equally with the door-to-door peddler, such advertisements often arrive "in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." *Redrup* v. *New York*, 386 U.S. 767, 769.[8] Frequently

[8] The Congress learned that many such advertisements are not readily identifiable as third class items, but are sent instead by first class mail. *Senate Hearing*, pp. 534, 542, 550, 570. This factor of confrontation is one important distinction between this case and *Lamont* v. *Commissioner of Motor Vehicles*, 269 F. Supp. 880 (S.D.N.Y.), on which appellants heavily rely. Equally important is the distinction noted by the court below, App. 63: *Lamont* was an effort to enjoin the sale of an entire list, without regard to whether individuals on it did or did not

there is the risk that children will reach the material first.[9] In these circumstances, Congress was well within the bounds of permissibility in concluding that this was a concern that warranted redress.

The fact that Section 4009 is directed at assaults on privacy in the recipient's home is constitutionally significant. Compare *Camara* v. *Municipal Court,* 387 U.S. 523, 530–531, with *See* v. *City of Seattle,* 387 U.S. 541, 545–546. Outside the home it is reasonable to expect that, whatever precautions they may take, individuals will necessarily be confronted with a variety of aural and visual stimuli they find distasteful. Any attempt to shape the public environment to suit an infinite variety of tastes is bound to be futile. But implicit in the concept of a home is a range of choice greater than an individual possesses on the streets or in other public places. There the wishes of a sensitive individual may be accommodated without undue inconvenience to the interests of others. Compare *Public Utilities Comm'n* v. *Pollak,* 343 U.S. 451.[10]

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wish to receive the mail which would be sent to them; "[h]ere we are concerned with a statute that proscribes mailings to an *unwilling* recipient *only*."

[9] The purpose to "afford parents a means to stop this material from reaching their children through the U.S. mails," H. Rep. No. 722, *supra*, at 68, was central to this legislation. That purpose is plainly legitimate, *Ginsberg* v. *New York*, 390 U.S. 629, and the means adopted are reasonably calculated to implement it.

[10] "Great as is the value of exposing citizens to novel views, home is one place where a man ought to be able to shut himself up in his own ideas if he desires." Chafee, *Free Speech in the United States*, 406 (1941), quoted with approval in *Breard* v. *Alexandria*, 341 U.S. 622, 639, n. 27.

The individual's freedom to control the flow of reading matter into his home—protected from governmental regulation by

C. THE BREADTH OF DISCRETION VESTED IN THE ADDRESSEE IS CONSISTENT WITH THE FIRST AMENDMENT AND DUE PROCESS

No excessive discretion is vested by Section 4009. The addressee is only empowered to determine what enters his own mailbox. His judgments have no general social effect.[11] The constitutionally protected rights of willing recipients are unimpaired by Section 4009. They are put under no burden of action or self-identification to receive the mail they desire. Cf. *Lamont* v. *Postmaster General,* 381 U.S. 301. The sole discretion conferred on the addressee merely pro-

Stanley v. *Georgia*, 394 U.S. 557—"is also impaired when unwanted obscenity is thrust upon him. Thus a corollary of the 'right to receive' obscene material may be the interest in avoiding undesired contact with it * * *. An attribute of privacy—just as of the 'right to receive'—is the ability to control one's personal environment. Unwanted intrusions violate one's privacy." Note, *The Supreme Court, 1968 Term*, 83 Harv. L. Rev. 62, 152 (1969). See also *Williams* v. *District of Columbia*, No. 20,927, decided June 20, 1969 (C.A.D.C.), referring to "verbal assault" as the gravamen of a public profanity charge; and *United States* v. *Klaw*, 350 F. 2d 155, 163–164 (C.A. 2), stating that obscene "material and conduct may also sometimes be suppressed and penalized because, like a common law nuisance, it constitutes an unreasonably offensive intrusion into the lives of persons, who cannot reasonably avoid it."

[11] The cases relied on by appellants as showing excessive delegation are thus readily distinguishable. *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, involved a delegation of legislative authority to the President, which violated the separation of powers. *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 311, conferred power on a majority "to regulate the affairs of an unwilling minority." No such grant of power can be found here. See *Currin* v. *Wallace*, 306 U.S. 1, 15–16; *Cusack Co.* v. *City of Chicago*, 242 U.S. 526, 529–531. If anyone seeks to dictate to unwilling minorities, it is the appellants in this case. Neither is there any problem of reviewing official action. Compare *Arizona* v. *California*, 373 U.S. 546, 626 (Harlan, J., dissenting in part). The addressee acts for himself, and his decision is final.

tects "the sensibilities of the unwilling recipient," *id.* at 310 (Brennan, J., concurring), in an area in which those sensibilities are subject to recurrent and blatant offense.

Furthermore, the complexities of defining and identifying obscenity and pandering are well known to this Court. *E.g., Jacobellis* v. *Ohio,* 378 U.S. 184. Judges have often divided on these issues. The statutory purpose could well be lost in an administrative and judicial maze if each addressee were compelled to defend, and each sender allowed to challenge before the Post Office and the courts, the addressee's determination that a mailing was sexually offensive. Given the problem of drawing fine lines in an area so subjective, it was eminently reasonable for Congress to leave the final judgment to each addressee.

One of the most important justifications for the regulation of obscenity is the "nuisance" or affront that it constitutes for the sensitive and captive viewer. Thus the determination of affront ought to be left to individual discretion, where that is possible without impinging on the free circulation of ideas. That course is possible in the mails as it is perhaps nowhere else. As this Court pointed out in *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 503, each method of dissemination presents "its own peculiar problems" and lends itself to different techniques of regulation. See also *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 386–387; *Times Film Corp.* v. *City of Chicago,* 365 U.S. 43, 49. Unlike other methods of dissemination, the distribution of obscene or pandering materials by mail is uniquely conducive to individual control and

variable standards of offensiveness. Cf. *Ginsberg* v. *New York*, 390 U.S. 629.

In sum no right of the advertiser to free speech is violated by an individual's discretion to secure from the Post Office a mail stop order, upon showing that he has received a commercial advertisement which he declares to be pandering in character. Indeed appellants do not seriously contend that the alleged infringement of free speech is to be found in the sole discretion provision of the statute. They argue only that if the discretion had been "granted directly to the Postmaster General," the statute would violate the First Amendment. Brief for the Appellants, pp. 18–19. But for that reason the power was not granted to the Postmaster General, and no such problem arises.

D. THE POSSIBILITY THAT THE STATUTE WILL BE USED BY PERSONS WHO DO NOT BELIEVE IN GOOD FAITH THAT THE ADVERTISEMENTS THEY RECEIVE PANDER TO INTERESTS IN EROTIC AROUSAL AND SEXUAL PROVOCATION CAN BE GUARDED AGAINST, IF NECESSARY, WITHOUT THE NECESSITY FOR ADMINISTRATIVE OR JUDICIAL DETERMINATIONS OF PANDERING CONTENT

The legislative history indicates that Congress accepted the possibility that some mail recipients would use Section 4009 to avoid mail from advertisers whom they did not genuinely believe to have been pandering as such. Nor would there be constitutional objection to a statute which extended the mechanism of Section 4009 to all commercial advertising mail, without regard to its possible relation to obscenity. Mailers have no right to force their commercial advertising materials on members of the public who have already seen them once and decided to accept no more, any more

than "a group of distributors could * * * insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet * * *." *Schneider* v. *State*, 308 U.S. 147, 160. This Court has "never intimated that the visitor could insert a foot in the door and insist on a hearing." *Kovacs* v. *Cooper*, 336 U.S. 77, 86.[12]

It is nonetheless true that this statute was adopted with the evils of pandering of sexually oriented materials particularly in mind, so that its extension to other areas on the legislative findings actually made is supported chiefly by considerations of workability and convenience. Moreover, decisions such as *Ginzburg* and *Redrup, supra,* suggest that the constitutional justifications for a pandering statute may be somewhat stronger than those for a statute directed to advertisements generally. And, use of the pejorative term "pandering" in notices and enforcement proceedings might appear unjustified as against businessmen whose advertisements were in fact being objected to for some other reason. These factors are among those which appear to have led *amicus* Direct Mail Advertising Association to argue that the statute's application must be limited to advertisements which are or reasonably could be thought to be pandering in fact.

[12] It bears repetition that unlike such cases as *Manual Enterprises* v. *Day*, 370 U.S. 478, this is not a case where the offense an advertiser gives to the few or to the many will result in a complete ban on his use of the mails. Rather it balances the expressed desire of a recipient to be left alone against the sender's claim of right to intrude himself *on that recipient*, solely for reasons of commercial gain.

We note, first, that appellants have not shown that their material cannot be regarded as "pandering," or that the persons who applied the "pandering" label to them did so in bad faith. There is no basis for such a contention in this record. Cf. App. 21, 28. If their materials in fact do fall within the "hard core" of materials recipients could believe to be pandering, it would be unnecessary now to resolve questions regarding the application of the statute to other materials. *Dombrowski* v. *Pfister,* 380 U.S. 479, 491–492. It seems unlikely that the members of the Direct Mail Advertising Association will be "chilled" in their selection of advertising copy by the possibility that a few recipients, for their own purposes, will object to it as pandering.[13] Moreover, they may well have a private tort remedy for any damages caused by the sting of a false accusation of pandering recklessly or maliciously made.

If the question is here, a much less drastic limitation on the statute will answer the complaint of the *amicus* without either eliminating the addressee discretion which was such a central feature of the proposed regulatory scheme or requiring the administrative and judicial determinations of pandering content which Congress was determined to avoid. The less drastic limitation would be to permit the judge to refuse enforcement of a Post Office order if he determined that the complainant did not in good faith

[13] Even undoubted panderers will feel no pressure to change the content of their speech; the only effect of the act is to compel them to be more scrupulous of the wishes of particular addressees not to receive their circulars.

object to an advertisement on the ground that it was pandering material offering erotic arousal or sexual provocation. That is, just as the statute requires that there be an advertisement offering matter for sale before an order can issue, it also could be said to require a determination in fact by the addressee that the advertisement panders salacious goods. Thus, where an advertisement has no apparent pandering content, a court may look behind the addressee's formal complaint to discover whether he in fact made in good faith the determination the statute calls for. Congress meant to enable citizens to exercise their own judgment regarding what was sexually provocative to them, however strained that judgment might seem; although it appears to have accepted the prospect, it had no purpose to allow them to use the statute for other purposes, under the cover of a mere formal statement.

The limitation we suggest would require no judicial or administrative determinations of pandering content. Ordinarily, it could be determined from the face of the advertisement complained of, together with the public statement of the addressee, that the required judgment had been made. There would be no occasion for further inquiry unless the nature of the advertisement gave reason to doubt the addressee's statement in his complaint that he has determined it to be pandering in character. Moreover, we suggest that any inquiry be confined to the judicial enforcement proceedings. No official sanction attaches before that stage; the question is not one which requires the particular expertise of the Post Office, but is if any-

thing more suitable for resolution in a court, which is able, *inter alia,* to compel the presence of witnesses; it is clear Congress wished to avoid drawn out administrative proceedings; and the fact that the Postmaster General and Attorney General are merely "authorized" to seek judicial enforcement, § 4009(d), suggests the exercise of a discretion on their part which would make the occasions for such hearings, and consequent disruptions of the congressional scheme, few.[14]

III. THE PROHIBITION OF "ANY FURTHER MAILINGS" OFFENDS NO CONSTITUTIONAL SAFEGUARDS

In support of their contention that the further mailing provision runs afoul of the First Amendment as a "prior restraint" on speech, appellants cite only *Walker* v. *Popenoe,* 149 F. 2d 511 (C.A.D.C.). That case involved an order of the Postmaster General excluding a particular pamphlet from the mail for obscenity. The court of appeals found that the pam-

[14] A similar limiting effect might be achieved by permitting review of an addressee's determinations for "abuse of discretion," refusing enforcement where discretion had been misused or where the court determined that no reasonable man could find the objected-to advertisement to have pandered to the taste for erotic arousal and sexual provocation. But a limitation so stated differs from that suggested in the text, in that it involves the courts in an objective determination of what may or may not be pandering and to that extent frustrates the congressional choice. Congress meant addressees to be free to defend their own views of pandering in their own homes, however unreasonable those views might appear. Compare *infra*, pp. 51–52.

phlet was not obscene, and held that in any event it could not be excluded from the mail without a hearing. The exclusion in *Walker* was from the mail generally, not merely from the mail of a particular addressee who had declared his unwillingness to receive the pamphlet. *Walker* has no possible application to Section 4009.

The vice that the appellants find in the further mailing provision is that it prohibits the sender from mailing anything else to the complaining addressee, regardless of the content of the subsequent mailing. In fact, however, in the context of this statute it is unlikely that even the most limited prohibitory order would result in anything less than the termination of all mailings to an addressee who requests such an order. Since appellants complain even of the expense of removing addressee's names from their mailing lists, it is improbable that they or other advertisers would adopt a procedure of picking and choosing which materials shall be sent to particular individuals, were the statute to permit certain types of further mailings but not others.

This point underscores the validity of regulation of commercial advertising which might in other contexts raise constitutional questions. See pp. 28–30, *supra*. The Act provides that a prohibitory order may issue only at the request of an addressee who has received a commercial advertisement. Congress knew that a commercial mailer who had received a prohibitory order would have scant interest in continued mailings to the same addressee except perhaps to avoid the inconvenience of removing the name from a mailing

list. Furthermore, any further mailing that occurs is likely to be a commercial solicitation. It is a matter of common knowledge that the only mail matter that ordinarily follows upon one advertisement to which there has been no affirmative response is another advertisement.

There is further reason in the structure of the industry principally affected to conclude that the statute does not have the effect of screening out the innocuous and the informative along with the indecent. Pandering is a specialized business. The evidence before Congress was that most of the complaints which gave rise to the statute "pertain to the indiscriminate mailings of a relatively few nationwide dealers." *House Hearing,* pt. II, p. 70. The operations of one dealer alone were responsible for more than 100,000 complaints to the Post Office Department in a four-year period. *Id.*, p. 71. There was no doubt in the evidence before Congress that the vast majority of pandering advertisements emanate from a few mail order houses specializing in this type of material. *Id.*, pp. 69–72.[15] Given the specialized nature of the pandering trade, Congress was justified in concluding that a prohibition of all further mailings to a complaining addressee would not result in an appreciable diminution of inoffensive material. This is a significant point when one balances against it the high financial and administrative costs entailed in establish-

[15] The record in the instant case is consistent with this conclusion. The affidavits appended to the complaint show that within only six months of the enactment of Section 4009, the appellants received between 7,000 and 10,000 prohibitory orders (App. 17–38; see Brief for the Appellants, p. 7).

ing the machinery that would be required if the further mailing provision had been drafted differently, as well as the significant burden that would be cast on the judiciary of reviewing thousands of administrative determinations as to the sexual offensiveness of further mailings.

Of course, we recognize that legislation in the area of free expression must be narrowly drawn. *Shelton* v. *Tucker*, 364 U.S. 479; *Talley* v. *California*, 362 U.S. 60; *Lovell* v. *City of Griffin*, 303 U.S. 444. But we stress again that this statute requires only the exclusion of mail from particular senders to particular addressees, who have firmly and formally stated their desire to receive no more, and does not involve a general ban of the mails. The addressee has made his individual choice to accept nothing further from a particular sender. There is every difference between an individual decision of this kind and a determination of general applicability that a certain sender may no longer use the mail.[16]

[16] *Summerfield* v. *Sunshine Book Co.*, 221 F. 2d 42 (C.A. D.C.), cited in the concurring opinion below, is inapposite for precisely this reason. The court in *Sunshine* held that the Postmaster General was not authorized to exclude from the mail all future issues of a magazine found on previous occasions to contain some obscene illustrations, but was authorized to exclude only already-published magazines duly found to contain obscene materials. The distinction between preventing the circulation of all future issues of a magazine, regardless of content and regardless of the desire of readers to receive it, and preventing further mailings to individual addressees who do not wish to receive them is plain. In the one case, free circulation is cut off at the source. In the other, free circulation continues, subject to decisions of individuals to except themselves.

If it is nonetheless necessary to narrow somewhat the statutory proscription of any further mailings, we believe all legitimate objections would be answered and the congressional scheme least disserved by a limitation of the prohibition to all further mailings of commercial advertisements offering matter for sale. As we have shown at some length above, a limitation of the prohibition to further mailings of objectively pandering materials would frustrate the congressional decisions to permit the addressee's (good faith) determination to control and to avoid extensive administrative and judicial inquiry. A limitation to further mailings like those which an addressee had initially found pandering would introduce intolerable uncertainty and complexity. Limiting the "further mailings" provision to further mailings of advertisements offering matter for sale, on the other hand, would involve neither subjectiveness or administrative proceedings. It would eliminate the possibility, remote in any event, that the order might be applied to personal correspondence, political tracts, or other matters far beyond congressional contemplation, at the cost of only a slight risk that the protesting addressee would continue to be offended.

IV. APPELLANTS' OTHER CONSTITUTIONAL OBJECTIONS LACK SUBSTANCE

A. THE REQUIREMENT THAT A SENDER DELETE THE NAMES OF COMPLAINING ADDRESSEES FROM ALL HIS MAILING LISTS EFFECTUATES THE "FURTHER MAILING" PROVISION AND DENIES NO CONSTITUTIONAL RIGHT

Section 4009(c) provides that a prohibitory order shall "direct the sender and his agents or assigns to

delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees."

The purpose of this provision is to insure that the addressee's wish to receive no further mailing is respected. The evidence before Congress indicated that there were essentially two kinds of mailing lists used in the pandering trade—random lists and "prime lists":

> List dealers and brokers compile lists of persons with an indicated susceptibility to certain product appeals or otherwise bring a mailer in contact with such a list. These lists are then obtained under a sale, rental, or exchange transaction by firms desiring to advertise particular products. Detailed records are kept and list prices rise or fall commensurate with the response ratio experienced.
>
> Smut dealers constantly strive to improve their own lists with names of those who have previously indicated an interest in erotica. In doing so, they will test any list that they can obtain regardless of its nature. The names of those who respond are transferred to the prime list and become a valuable property for sale or barter to other dealers in the same field.

House Hearing, pt. II, p. 71. As we have suggested above, Congress found that saturation mailing from random lists had resulted in repeated solicitations to

people who had never expressed an interest in receiving salacious material and who may have objected to receiving this material, but to no avail. The economics of mail advertising is such that it is far cheaper to continue sending advertisements to addressees with no conceivable interest in responding than to delete the name of an offended addressee. Section 4009(c) attempts to rectify that economic imbalance in the interest of the many offended recipients. The requirement that the sender refrain from trading in lists from which the deletion has not been made is designed simply to insure that the deletion will be made. It is premised on the fact that mailers in a particular trade exchange lists and that a list that has been used by one sender to mail pandering material may be used by another in the same trade to send similar material.

Short of a showing that the removal requirement would be so costly as to prevent the appellants from distributing their advertisements at all,[17] the problem is one which can be handled like any business expense, and scarcely rises to First Amendment dimensions. Alphabetization and codification of the lists are obvious as techniques of reducing these costs among those whose business is such that they frequently re-

[17] We do not concede that constitutional problems would arise even if such an effect were occasionally felt. The limiting construction suggested above, pp. 39–41, requiring the addressee's discretionary determination regarding pandering to have been made in good faith, would foreclose any possibility that a concerted effort might be made to drive a mail advertiser, such as a magazine, out of business for essentially ideological reasons.

ceive such orders.[18] Even as the lists are presently kept, the costs of deleting names appear not to be great.

Thus, one of the appellants states in an affidavit (App. 17–19) that his business possesses 115 lists, each containing 20,000–25,000 names, or a total of 2,300,000 to 2,875,000 names. He states that he has received to date 250 prohibitory orders and more than 3,000 requests from mailers to whom the lists are rented that names be removed from the lists. His total cost of removing these names is estimated at $7,000.00. Assuming these figures to be accurate, the cost per name-removal is therefore $2.18. When the cost is spread over the total number of names on this affiant's lists, it amounts to less than one-third of one cent per name. Thus, far short of a finding that the expenses imposed by the statute tend to diminish the flow of ideas, appellants' argument is that even though an addressee has deliberately taken the trouble to file a form stating that he wishes to receive nothing more from a named mailer, that mailer has the constitutional right to override the addressee's decision and the judgment of Congress and force him to file a new form each time

[18]Although appellant's affidavits suggest to the contrary (App. 19, 23–24, 37), it is Post Office policy not to proceed with orders unless the complaining addressee forwards all information necessary to enable the sender to identify the name and address used on his lists. For that reason, the addressee is required to submit all the materials he receives, including mailing labels, to the local postmaster. App., *infra*, p. 58. That information is then to be transmitted to the mailer. We are informed that the Post Office would not seek judicial enforcement of an order unless this has been done, and concede that it would be improper to grant such enforcement unless the information had been conveyed, giving the sender an opportunity to comply.

he is repulsed or offended by the material he receives. There is nothing but empty formalism in this contention.

B. SINCE SECTION 4009 PROVIDES FOR ADEQUATE NOTICE AND A FULL JUDICIAL HEARING BEFORE ANY SANCTION ATTACHES, IT COMPORTS WITH DUE PROCESS OF LAW

Section 4009 provides that at the request of a complaining addressee a prohibitory order shall issue to the sender. The order directs the sender to refrain from further mailings to the named addressee. If the Postmaster General believes the sender is violating the order, he then serves a complaint on the addressee and allows fifteen days for a response. If the addressee so requests, a full hearing is held to determine whether there has been a violation of the prohibitory order.[19] If a violation is found, the Postmaster General may request the Attorney General to apply for a district court order directing compliance. At this stage, the sender is entitled to a full hearing before the district court. He may contest the evidence of the violation and the validity of the order. Cf. 3 Davis, *Administrative Law Treatise,* § 23.07, p. 320–321 (1958). If, for example, the court finds that an order had been issued although there had not been an advertisement offering something for sale, it may decline to enforce it. The panoply of procedural protections, including subpoena, confrontation and cross-examination, are available in the district court.

[19] The hearing also would consider any contention that the mailing initially complained of was not an advertisement of matter for sale.

If the court finds a violation, it will then issue an order directing compliance with the prohibitory order. Up to this point, the sender has risked nothing. Only if he violates the order of the court does he risk contempt. Even then, willfulness would be an element of the contempt, and then there would be still another hearing to determine whether the court order had been violated. Finally, the penalty to be imposed would be determined by the court and would depend on the circumstances of the contempt.

The statute, then, contemplates one administrative hearing and two judicial hearings before the contempt sanction may attach. The procedural safeguards are sufficient, especially given the insubstantial interest a sender has in continued mailings to an objecting addressee, and they are afforded in advance of any sanction. *Nickey* v. *Mississippi,* 292 U.S. 393, 396. At every stage, the burden of moving for enforcement rests with either the addressee or the government. Section 4009 accords every element of due process. Cf. *Freedman* v. *Maryland,* 380 U.S. 51.

For the reasons set out above, we believe that the statute infringes none of appellants' constitutional rights. Therefore, we have not discussed whether it would also be constitutional as construed by the majority below, or by the concurring judge.[20] Of course, we agree with the concurrence that Congress'

[20] For the reasons set out in the opinion of the concurring judge, there could be little doubt of the constitutionality of a scheme requiring an objective determination of pandering. App. 76–77; *Ginzburg* v. *United States,* 383 U.S. 463, 467–468.

> overriding intent was to enact a constitutional statute which would simultaneously shield senders of materials entitled to First Amendment protection from interference with their mailing rights and give to addressees offended by solicitations from commercial pornographers a remedy for their distress. [App. 77 n. 6.]

See *Senate Hearing,* pp. 518–519, 525–528, 532–534; *House Hearing,* pt. 1, pp. 8, 11; H. Rep. No. 722, 90th Cong., 1st Sess., pp. 68–69 (1967); 113 Cong. Rec. 28659–28661, 34230–34232 (1967). And if convinced that a limiting construction were necessary "in the candid service of avoiding a serious constitutional doubt," *United States* v. *Rumely,* 345 U.S. 41, 47, this Court might be warranted in such a construction of the Act. Cf. *Greene* v. *McElroy,* 360 U.S. 474; *Hannegan* v. *Esquire, Inc.,* 327 U.S. 146.

We think there must be serious hesitation even before finding a requirement of judicial review of the issue of pandering to avoid such doubts, when it is so clear Congress precisely chose against such procedure. And, even if there is a basis for constructing the framework of judicial review anticipated by Senator Javits, 113 Cong. Rec. 34231, and which would have been required by the concurring judge below (App. 76), it would completely rewrite the statute to establish an *administrative* determination of pandering *vel non.* Cf. *United States* v. *Robel,* 389 U.S. 258, 262. Neither an administrative determination of pandering nor a test of permissible "further mailings"

which would depend upon the materials an addressee initially found objectionable, see pp. 26–27 *supra*, would be an acceptable reworking of the statutory scheme.

CONCLUSION

For the reasons stated above, the judgment of the district court should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.
PETER L. STRAUSS,
Assistant to the Solicitor General.
ROBERT V. ZENER,
DONALD L. HOROWITZ,
Attorneys.

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APPENDIX

39 U.S.C. (Supp. IV) 4009:

§ 4009. Prohibition of pandering advertisements in the mails.

(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postmaster General to refrain from further mailings of such materials to designated addressees thereof.

(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postmaster General shall issue an order, if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees.

(c) The order of the Postmaster General shall expressly prohibit the sender and his agents or assigns from making any further mailings to the designated addressees, effective on the thirtieth calendar day after receipt of the order. The order of the Postmaster General shall also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

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(d) Whenever the Postmaster General believes that the sender or anyone acting on his behalf has violated or is violating the order given under this section, he shall serve upon the sender, by registered or certified mail, a complaint stating the reasons for his belief and request that any response thereto be filed in writing with the Postmaster General within fifteen days after the date of such service. If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a district court of the United States for an order directing compliance with such notice.

(e) Any district court of the United States within the jurisdiction of which any mail matter shall have been sent or received in violation of the order provided for by this section shall have jurisdiction, upon application by the Attorney General, to issue an order commanding compliance with such notice. Failure to observe such order may be punished by the court as contempt thereof.

(f) Receipt of mail matter thirty days or more after the effective date of the order provided for by this section shall create a rebuttable presumption that such mail was sent after such effective date.

(g) Upon request of any addressee, the order of the Postmaster General shall include the names of any of his minor children who have not attained their nineteenth birthday, and who reside with the addressee.

(h) The provisions of subchapter II of chapter 5 (relating to administrative procedure) and chapter 7 (relating to judicial review) of

part I of title 5, United States Code, shall not apply to any provisions of this section.

(i) For the purposes of this section—

(1) mail matter, directed to a specific address covered in the order of the Postmaster General, without designation of a specific addressee thereon, shall be considered as addressed to the person named in the Postmaster General's order; and

(2) the term "children" includes natural children, stepchildren, adopted children, and children who are wards of or in custody of the addressee or who are living with such addressee in a regular parent-child relationship.

POD Publication 125, April 1968

A Guide for Postal Service Centers

Administering the Pandering Advertisements Statute

(39 U.S. Code 4009)

Post Office Department, Washington, D.C. 20260

I. INTRODUCTION

On December 16, 1967, President Lyndon B. Johnson signed into law the Postal Revenue and Federal Salary Act of 1967 (Public Law 90–206), Title III of this act added a new section to Title 39, the Postal Service Title of the United States Code. The new section, numbered 4009, was given an effective date of April 14, 1968.

Section 4009 was enacted as a response to the increasingly serious problem of use of the United States mails by smut peddlers. All too much of the erotic material sent through the mail is not prohibitable under the Postal Obscenity Statute, Title 18, United States Code, 1461. Thus Congress developed section 4009 as an effective auxiliary method of controlling the flow of erotic material in the mail.

To avoid Constitutional objections (freedom of speech and press) which would surely invalidate any attempt to give the Government far-reaching power to initiate prohibition of erotic matter from the U.S. mails, Congress placed the responsibility for initiating such prohibition with the postal patron. Thus it is important to remember that in commencing proceed-

ings under section 4009, the initiative must originate with the postal patron—not with the Post Office Department. The Department's proper role in the commencement of proceedings under this statute is solely to inform the patron, as much as necessary, of his rights under the new law, and to process his case once he has decided to initiate action. Such information will be made available to inquiring postal patrons at Headquarters and field installations. Processing of each case will be handled by the postal services centers listed in section 318.5, Postal Manual. Administrative hearings on these cases will be handled by the offices of regional counsel. Appeals from adverse decisions resulting from such administrative hearings will be handled by the Mailability Division, Office of the General Counsel, Post Office Department, Washington, D.C. 20260.

II. THE PATRON'S RESPONSIBILITY

Section 4009 proceedings cannot commence until a postal patron has decided a mail piece he has received constitutes a pandering advertisement offering to sell erotically arousing or sexually provocative matter. The patron has, by the provisions of the new law, the sole authority and responsibility to make this decision.

If the patron decides he has received such a mailing, and if he desires the Post Office Department to prevent the sender of that mailing from making any further mailings to him and/or his children under nineteen years old residing with him, he must notify the Post Office Department of these facts.

The Department provides Form 2150, Notice for Prohibitory Order Against Sender of Pandering Advertisement In the Mails, for the patron's use. The patron must print on the form the name and address

of the addressee of the objectionable mailing, and the name and address of the sender of that mailing. He must also print in the names and birth dates of any of his children he desires to be protected by the Department's order. Children eligible for such protection are unmarried children of the addressee who are under nineteen years old and reside with the addressee under his care.

The addressee must then sign the form, which includes a statement of his decision concerning the character of the mailing, a statement as to the eligibility of any of his children listed thereon, and a request for issuance of an order under the provisions of section 4009. If Form 2150 is not available, or if, for any other reason, an addressee does not use the form, he must be sure to include all the aforementioned statements, requests, information, and signature in the Notice he prepares on plain paper.

The patron should send this Notice together with the objectionable mailing (wrapper and enclosures) to his local postmaster or preferably to his nearest postal services center. If the Notice is sent to the local postmaster, it should contain on the front of its envelope the printed words "REQUEST FOR PROHIBITORY ORDER". This will facilitate forwarding by the local postmaster to the appropriate postal services center.

III. PROCESSING THE PATRON'S REQUEST

When a patron's Notice for Prohibitory Order is received at a postal services center, first determine whether it has arrived at the proper services center. Each Notice will be processed at the postal services center which encompasses the patron's city. A Notice arriving at a services center outside the patron's area

should be forwarded to the appropriate services center.

A patron's Notice, properly directed to the correct services center, should be assigned a case number running chronologically.

Each services center will maintain a log book of Notices processed during each calendar year. When a case number has been assigned, enter that number in the log book. Next to the number enter the following:

a. The name and address of the patron sending the Notice.

b. The name and address of the mailer complained of in the Notice.

c. The name of the services center employee to whom the Notice has been assigned for processing.

d. The day, month, and year when the Notice was received by the services center.

Each services center will also keep a log of Notices received which were not within its geographical jurisdiction and were therefore forwarded to the appropriate services center for processing. These forwarded Notices will not be assigned a case number by the forwarding services center. Record only the name and address of the patron; the day, month and year the Notice was received; the day, month, and year the Notice was forwarded; and the services center to which it was forwarded.

The next step in processing a Notice is to jacket the Notice, with all accompanying enclosures, in a folder. All matter pertinent to the case would be filed in this jacket.

When determined that the patron has properly done his part as described in part II, the mailing which the patron has characterized as a pandering advertisement must be examined to determine if it is, in fact, an advertisement. It is important to emphasize, at this

point, that the only question to be determined by the services center with respect to the offending mail piece is whether it constitutes an advertisement. The Department has no authority to review or question the patron's decision that the subject matter of the offending mail piece is erotically arousing or sexually provocative.

To constitute an advertisement, the offending mail piece must be material—including, but not limited to, display, classified or editorial styles—which offers for sale any matter which the addressee thereof believes, in his sole discretion, to be erotically arousing or sexually provocative.

If a patron's Notice does not furnish the necessary information, is not properly completed, or does not enclose all of the offending mail piece, send a statement of the deficiencies of the notice to the patron, suggesting that they be corrected if he desires action under section 4009. Retain the deficient original Notice, with any accompanying enclosures, in the case file except where it is absolutely necessary that part or all of them be returned to the patron so he can make the required corrections.

If the offending mail piece is found by the services center to not constitute an advertisement as defined above, notify the patron of this finding and that, therefore, the requested prohibitory order cannot be issued.

IV. ISSUANCE OF THE PROHIBITORY ORDER

When a patron's Notice is properly completed and filed, and the offending mail piece is, in fact, an advertisement as defined herein, then under the authority delegated by the Postmaster General, the postmaster of the services center shall issue a Prohibitory Order on Form 2152. Insert the case number

on the form in the "Prohibitory Order No." blank. Strike out the words, "and his minor children residing with him who have not attained their nineteenth birthday", appearing in brackets on the front of the form, if the addressee has not requested inclusion of such children in the order. List the names of the parties to be protected by the order in the blanks provided. Also list the address to be protected by the order in the appropriate blank. The Order shall be signed by the postmaster of the services center, postmarked in the space indicated on the order, and dated with the date the postmaster signed it. Send the original Order registered mail, return receipt requested, to the mailer of the offending mail piece. Send a copy of the Order to the addressee of the offending mail piece. Place other copies in the case file.

If, after a Prohibitory Order has been issued, the issuing services center receives notification from the patron who requested the Order that he has moved to an address different from the one covered in the order, the services center shall issue a modified Order to the mailer covering the new address. Send the original of the modified Order registered mail, return receipt requested, to the mailer. Send a copy to the addressee, and place other copies in the case file. The modified Order will supersede the original Order and the statutory periods of time allowed for compliance with a Prohibitory Order shall begin to run from the date of the mailer's receipt of the modified Order.

V. VIOLATIONS OF PROHIBITORY ORDERS

The Prohibitory Order issued under section 4009—including any modified Order—will direct the mailer of the pandering advertisement, effective thirty calendar days after the mailer's receipt of the Order, to make no further mailings of any kind to the persons

protected by the Order. As stated, this prohibition extends to any and every type mailing, not just future pandering advertisements.

Thus, if on or after the thirtieth calendar day after the date of the mailer's receiving the Order, that mailer deposits in the mails anything addressed to the persons and address protected by the Order, that mailer has thereby violated the Prohibitory Order.

In determining whether a Prohibitory Order has been violated, bear in mind that matter deposited in the mails and bearing the address protected by the Order, shall be considered, by authority of section 4009, as being addressed to a person protected by the Prohibitory Order even though no person's name appears on the mail piece as addressee of that mail piece. If a person's name does appear on the mail as addressee of that mail piece, and such name is not one protected by the Prohibitory Order, the mail piece does not violate the Prohibitory Order. Such a non-violative mail piece should be returned to the mails for normal handling.

Each Prohibitory Order will also direct the mailer, effective immediately upon his receipt of the Order, to delete the names of the persons protected by the Order from all mailing lists owned or controlled by the mailer or his agents or assigns. Further, the Order will direct the mailer to immediately refrain from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the protected persons. If the mailer fails to comply with these directions, he will have violated the Order.

If any violation of a Prohibitory Order is committed, it is no defense or justification to the mailer that the violation was committed by his agents or assignee. All Prohibitory Orders apply as fully to the mailer's agents and assigns as they do to the mailer

himself. Of course, the form of organization or entity in which the mailer conducts his business—be it in the form of a sole proprietorship, partnership, unincorporated association, corporation, etc.—makes absolutely no difference in the effectiveness of a Prohibitory Order. The Order applies to the mailer, his agents and assigns no matter in what form of organization they choose to conduct their business.

Upon a services center's receiving evidence that a Prohibitory Order it issued has been violated, the services center shall immediately send to the apparent violator by registered mail, return receipt requested, a Violation Complaint, Form 2153, and copy of the Rules of Practice (POD Publication 124). Prepare the complaint on Form 2153. The original goes to the apparent violator, and copies are placed in the case file. The Docket Number is obtained by calling the regional counsel. Directly under the Prohibitory Order number and following the words "Issued Against", insert the name of the mailer against whom the Prohibitory Order was issued. Insert the name of the addressee complaining of a violation of the Order—or, in cases where the evidence of violation is submitted by other than a protected addressee, the name of the addressee who requested the Prohibitory Order—in the "Complaining Addressee" blank. Indicate the nature of the violation on the Complaint by using any or all of paragraphs 1, 2, or 3. If none of these paragraphs is suitable, describe the violation in paragraph 4. Strike out any of the numbered paragraphs which are not applicable to the particular violation. Complete other items as indicated on the forms.

The Complaint indicates that exhibits evidencing the alleged violation are attached to the Complaint. This does not mean that the originals of the evidence of violation should be sent to the alleged violator. On

the contrary, attach the originals of the evidence to the first copy of the Complaint form and place in the case file. Make photocopies in quadruplicate of the evidence, and attach a complete photocopy of all the evidence to the original Complaint which goes to the apparent violator. Attach complete photocopies of all evidence to the second, third, and fourth copies of the Complaint and place in the file.

The alleged violator has fifteen days from the date of his receipt of the Complaint within which to request a hearing on the allegations.

If he makes such a request within fifteen days after the date of receipt, the services center should place the request in its file of the case. The case file should then be sent by registered mail, return receipt requested, to the office of regional counsel for the region in which the services center is located. If there is no incumbent regional counsel for that region, send the file to the incumbent regional counsel of the nearest regional office.

If a request for a hearing is not filed within the allotted fifteen-day period, the services center shall continue to handle the case. The postmaster of the services center will proceed to examine the evidence of violation to determine if, in fact, a violation has occurred. In arriving at such determination, the postmaster will consider any matter in response to the Complaint which the mailer has filed with the services center within fifteen days after his receipt of the Complaint.

If the postmaster concludes a violation has been committed, he shall send notice of this conclusion—using Form 2154—to the mailer. Fill out Form 2154 in the manner prescribed for the other forms. Place copies of the notice of the postmaster's conclusion in the case file and then forward the entire file by regis-

tered mail, return receipt requested, to the Assistant General Counsel, Mailability Division, Post Office Department, Washington, D.C. 20260, for further processing.

If the postmaster concludes, after weighing all the evidence and any timely-filed response of the mailer, that the Prohibitory Order has not been violated, he will write a brief memorandum of his opinion and place it in the case file along with all the matter considered in reaching his decision. However, if a piece of mail submitted as evidence of violation of an Order has not yet been delivered to the addressee, place a photocopy of it in the file and return the mailpiece itself to the mails for normal handling.

VI. CONCLUSION

The purpose of this guide is to assist Departmental implementation of section 4009. Careful attention to this guide will keep procedural and administrative problems to a minimum. Applying the rules in a fair, common-sense, courteous manner, is indispensable to the smooth functioning of any extensive system. In these respects the Department has the utmost confidence in the capabilities of the employees charged with the responsibility of making this new law work.

Should questions arise at the postal services center level requiring technical guidance not furnished by this guide or other Departmental publications, contact the appropriate regional counsel. Questions which cannot be resolved by the regional counsel shall be presented by them to the Assistant General Counsel, Mailability Division, at Headquarters.

With the harmonious cooperation of all levels concerned in administering section 4009, the intent of Congress and the desire of the Department to protect the privacy of the postal patron will be more effectively accomplished.

HOW YOU CAN CURB PANDERING ADVERTISEMENTS

A family receiving a pandering advertisement which it finds offensive has authority under a new Federal law[1] to ask that its members receive no more mail *of any kind* from the sender. An advertisement is considered pandering if it offers to sell material which is, *in the opinion of the recipient,* "erotically arousing or sexually provocative." The material can be in the form of a display, classified, or editorial-style advertisement.

The individual mail patron is the sole judge of whether an advertisement is offensive to him. If you or your family finds the material offered is of a pandering nature, complete the statement on the back page of this leaflet in asking a postmaster to curb the receipt of additional mail from the sender. Children under 19 years of age residing in your house can be listed in the request by name and age.

PURPOSE OF LAW

American families are shocked on occasion by advertisements which they find offensive or believe to be morally harmful to their children. While in most cases the ads are not legally obscene and are therefore mailable, they are clearly unwelcome in many homes. This law gives families the right to decide they want no more mail from a firm sending out what they consider pandering advertising, but it does not deny others the right to an unrestricted flow of material which is mailable.

With the major share of the so-called pandering advertising coming from a small number of dealers, many of whom exchange mailing lists, it is believed

[1] *Prohibition of Pandering Advertisements In the Mail, Public Law 90–206, Title III, 39 U.S. Code § 4009.*

that the patron's request will provide substantial relief to those who do not want such material.

HOW THE LAW WORKS

Families receiving advertising from U.S. mails which they believe is pandering can ask a postmaster to direct that the promoter send no more mail, of any kind, to them. The sender is also ordered to remove the family's name from any mailing lists he owns, controls or rents. If a family moves and it wishes to continue the order at the new address, it is necessary to furnish the new address to the postmaster who issued the order.

ENFORCING THE LAW

The Post Office Department and the Department of Justice are required by the law to follow several specific steps in carrying out a family's request that it receive no more mail from a firm mailing what they believe is pandering advertising.

When the patron's request is properly submitted the Post Office Department sends a "prohibitory order" directing the sender to refrain from any further mailing of any kind to the complaining patron. This is effective 30 days after sender's receipt of the order.

The patron must bring any violation of the order to the attention of the postmaster who issued the order, enclosing all evidentiary matter, such as the second mailing and its envelope.

If the mailer still fails to respect the order, and the Department finds that it is being violated, the Postmaster General will ask the Attorney General to apply for a Federal Court order directing compliance. Failure to observe the court's order may be punishable by a fine or imprisonment.

To initiate an order . . . Send offensive advertisement, its envelope and signed form to postmaster with the words: "Request for prohibitory order" on face of your envelope.

USE THIS FORM

I, _____ addressee
(parent of addressee) of enclosed
mailing from _____
(print mailer's name)

_____
(address ,city, state, ZIP code)

consider this mailing to be a pandering advertisement which offers for sale erotically arousing or sexually provocative matter.

Accordingly, under the provisions of Title 39, United States Code, § 4009, I request that the above-named mailer, and his [its] agents or assigns, be directed to refrain from making any further mailings to me, [as well as to my below-listed minor children residing with me who have not attained their nineteenth birthday].

_____
Your signature Date

_____
Street

_____
City, State, and ZIP Code

List Children and Birthdates:

_____

_____

_____

_____

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SUPREME COURT OF THE UNITED STATES

No. 399.—October Term, 1969

Daniel Rowan, dba American Book Service, et al., Appellants, *v.* United States Post Office Department et al.	On Appeal From the United States District Court for the Central District of California.

[May 4, 1970]

Mr. Chief Justice Burger delivered the opinion of the Court.

Appellants challenge the constitutionality of Title III of the Postal Revenue and Federal Salary Act of 1967, 81 Stat. 645, 39 U. S. C. § 4009 (Supp. IV, 1969), under which a householder may require that a mailer remove his name from its mailing lists and stop all future mailings to the householder. The appellants are publishers, distributors, owners, and operators of mail order houses, mailing list brokers, and owners and operators of mail service organizations whose business activities are affected by the challenged statute.

A brief description of the statutory framework will facilitate our analysis of the questions raised in this appeal. Title III of the Act is entitled "Prohibition of pandering advertisements in the mails." It provides a procedure whereby any householder may insulate himself from advertisements that offer for sale "matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative." 39 U. S. C. § 4009 (a).[1]

[1] Subsection (g) provides that upon the addressee's request the order shall include the names of the addressee's minor children who reside with him and who have not attained their nineteenth birthday.

Subsection (b) mandates the Postmaster, upon receipt of a notice from the addressee specifying that he has received advertisements found by him to be within the statutory category, to issue on the addressee's request an order directing the sender and his agents or assigns to refrain from further mailings of such materials to the named addressees. Additionally, subsection (c) requires the Postmaster to order the affected sender to delete the name of the designated addressee from all mailing lists owned or controlled by the sender and prohibits the sale, rental, exchange, or other transactions involving mailing lists bearing the name of the designated addressee.

If the Postmaster has reason to believe that an order issued under this section has been violated, subsection (d) authorizes him to notify the sender by registered or certified mail of his belief and the reasons therefor, and grant him an opportunity to respond and have a hearing on whether a violation has occurred.

If the Postmaster thereafter determines that the order has been or is being violated, he is authorized to request the Attorney General to seek an order from a United States District Court directing compliance with the prohibitory order. Subsection (e) grants to the District Court jurisdiction to issue a compliance order upon application of the Attorney General.

Appellants initiated an action in the United States District Court for the Central District of California upon a complaint and petition for declaratory relief on the ground that 39 U. S. C. § 4009 is unconstitutional. They alleged that they have received numerous prohibitory orders pursuant to the provisions of the statute. Appellants contended that the section violates their rights of free speech and due process guaranteed by the First and Fifth Amendments to the United States Constitution. Additionally, appellants argued that the section

is unconstitutionally vague, without standards and ambiguous.

A three-judge court was convened pursuant to 28 U. S. C. § 2284 (1964) and determined that the section was constitutional when interpreted to prohibit advertisements similar to those initially mailed to the addressee.[2]

The District Court construed subsections (b) and (c) to prohibit "advertisements similar" to those initially mailed to the addressee; future mailings, in the view of the District Court, "are to be measured by the objectionable materials of such first mailing." In our view Congress did not intend so restrictive a scope to those provisions.

(1) Background and Congressional Objectives

Section 4009 was a response to public and congressional concern with use of mail facilities to distribute unsolicited advertisements that recipients found to be offensive because of their lewd and salacious character. Such mail was found to be pressed upon minors as well as adults who did not seek and did not want it. Use of mailing lists of youth organizations was part of the mode of doing business. At the congressional hearings it developed that complaints to the Postmaster General increased from 50,000 to 250,000 annually. The legislative history, including testimony of child psychology specialists and psychiatrists, reflected concern over the impact of the materials before the Committee on the development of children. A declared objective of Congress was to protect minors and the privacy of homes from such material and to place the judgment of what constitutes

[2] Judge Hufstedler, concurring specially but without dissent, would require the District Court prior to issuing a compliance order to determine *de novo* whether the sender is a person who has mailed or has caused to be mailed any pandering advertisements.

an offensive invasion of those interests in the hands of the addressee.

To accomplish these objectives Congress provided in subsection (a) that the mailer is subject to an order "to refrain from further mailings of such materials to designated addressees." Subsection (b) states that the Postmaster General shall direct the sender to refrain from "further mailings to the named addressees." Subsection (c) in describing the Postmaster's order states that it shall "expressly prohibit the sender . . . from making any further mailings to the designated addressees . . . ." Subsection (c) also requires the sender to delete the addressee's name "from all mailing lists" and prohibits the sale, transfer, and exchange of lists bearing the addressee's name.

There are three plausible constructions of the statute, with respect to the scope of the prohibitory order. The order could prohibit all future mailings to the addressees, all future mailings of advertising material to the addressees, or all future mailings of similar materials.

The seeming internal statutory inconsistency is undoubtedly a residue of the language of the section as it was initially proposed. The section as originally reported by the House Committee on the Post Office and the Civil Service prohibited "further mailings of such pandering advertisements," § 4009 (a), "further mailings of such matter," § 4009 (b), and "any further mailings of pandering advertisements," § 4009 (c). H. R. Rep. No. 722, 90th Cong., 1st Sess. 125–126 (1967). The section required the Postmaster General to make a determination whether the particular piece of mail came within the proscribed class of pandering advertisements, "as that term is used in the *Ginzburg* case." *Id.*, at 69.

The section was subsequently amended by the House of Representatives to eliminate from the Post Office any censorship function. Congressman Waldie, who proposed the amendment, envisioned a minimal role for the Post Office. The amendment was intended to remove "the right of the Government to involve itself in any determination of the content and nature of these objectionable materials . . . ." 113 Cong. Rec. 28660 (1967). The only determination left for the Postmaster General is whether or not the mailer has removed the addressee's name from the mailing list. Statements by the proponents of the legislation in both the House and Senate manifested an intent to prohibit all further mailings from the sender. In describing the effect of his proposed amendment Congressman Waldie stated:

> "So I have said in my amendment that if you receive literature in your household that you consider objectionable . . . you can inform the Postmaster General to have your name stricken from that mailer's mailing list." 113 Cong. Rec. 28660.

The Senate Committee Report on the bill contained similar language:

> "If a person receives an advertisement which . . . he . . . believes to be erotically arousing . . . he may notify the Postmaster General of his determination. The Postmaster General is then required to issue an order directing him to refrain from sending any further mailings of any kind to such person." S. Rep. No. 801, 90th Cong., 1st Sess. 38.

Senator Monroney, a major proponent of the legislation in the Senate, described the bill as follows:

> "With respect to the test contained in the bill, if the addressee declared it to be erotically arousing

> or sexually provocative the Postmaster General would have to notify the sender to send no more mail to that address . . . ." 113 Cong. Rec. 34231 (1967).[3]

The legislative history of subsection (a) thus supports an interpretation that prohibits all future mailings independent of any objective test. This reading is consistent with the provisions of related subsections in the section. Subsection (c) provides that the Postmaster General "shall also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees." 39 U. S. C. § 4009 (c) (Supp. IV, 1969).

It would be anomalous to read the statute to affect only similar material or advertisements and yet require the Postmaster General to order the sender to remove the addressee's name from all mailing lists in his actual or constructive possession. The section was intended to allow the addressee complete and unfettered discretion in electing whether or not he desired to receive further material from a particular sender. See n. 6, *infra*. The impact of this aspect of the statute is on the mailer, not the mail. The interpretation of the statute that most completely effectuates that intent is one which prohibits any further mailings. Limiting the prohibitory order to similar materials or advertisements is open to at least two criticisms: (a) it would expose the householder to further burdens of scrutinizing the mail for objectionable

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[3] Senator Hruska spoke similarly: "Title III would allow the recipient of obscene mail to return it to the Postmaster General with a request that the Postmaster General notify the sender to stop mailings to the addressee . . . ." 113 Cong. Rec. 34232 (1967).

material and possible harassment, and (b) it would interpose the Postmaster General between the sender and the addressee and, at the least, create the appearance if not the substance of governmental censorship.[4] It is difficult to see how the Postmaster General could decide whether the materials were "similar" or possessing touting or pandering characteristics without an evaluation suspiciously like censorship. Additionally, such as interpretation would be incompatible with the unequivocal language in subsection (c).

(2) First Amendment Contentions

The essence of appellants' argument is that the statute violates their constitutional right to communicate. One sentence in appellants' brief perhaps characterizes their entire position:

> "The freedom to communicate orally and by the written word and, indeed, in every manner whatsoever is imperative to a free and sane society." Brief for Appellants at 15.

Without doubt the public postal system is an indispensable adjunct of every civilized society and communication is imperative to a healthy social order. But the right of every person "to be let alone" must be placed in the scales with the right of others to communicate.

In today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of

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[4] Subsection (d) vests the Postmaster General with the duty to determine whether the sender has violated the order. This determination was intended to be primarily a ministerial one involving an adjudication whether the initial material was an advertisement and whether the sender mailed materials to the addressee more than 30 days after the receipt of the prohibitory order. An interpretation which requires the Postmaster General to determine whether the subsequent material was pandering and/or similar would tend to place him "astride the flow of the mail . . . ." *Lamont* v. *Postmaster General,* 381 U. S. 301, 306 (1965).

individual autonomy must survive to permit every householder to exercise control over unwanted mail. To make the householder the exclusive and final judge of what will cross his threshold undoubtedly has the effect of impeding the flow of ideas, information and arguments which, ideally, he should receive and consider. Today's merchandising methods, the plethora of mass mailings subsidized by low postal rates, and the growth of the sale of large mailing lists as an industry in itself have changed the mailman from a carrier of primarily private communications, as he was in a more leisurely day, and has made him an adjunct of the mass mailer who sends unsolicited and often unwanted mail into every home. It places no strain on the doctrine of judicial notice to observe that whether measured by pieces or pounds, Everyman's mail today is made up overwhelmingly of material he did not seek from persons he does not know. And all too often it is matter he finds offensive.

In *Martin* v. *Struthers*, 319 U. S. 141 (1943), MR. JUSTICE BLACK, for the Court, while supporting the "[f]reedom to distribute information to every citizen," *Id.*, at 146, acknowledged a limitation in terms of leaving "with the homeowner himself" the power to decide "whether distributors of literature may lawfully call at a home." *Id.*, at 148. Weighing the highly important right to communicate, but without trying to determine where it fits into constitutional imperatives, against the very basic right to be free from sights, sounds and tangible matter we do not want, it seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee.

The Court has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property. See *Martin* v. *Struthers*, *supra*; cf. *Hall* v. *Commonwealth*, 188 Va. 72, 49 S. E. 2d 369, appeal dismissed, 335 U. S. 875 (1948). In this

case the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer.

To hold less would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home. Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail. The ancient concept that "a man's home is his castle" into which "not even the king may enter" has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another. See *Camara* v. *Municipal Court*, 387 U. S. 523 (1967).

Both the absoluteness of the citizen's right under § 4009 and its finality are essential; what may not be provocative to one person may well be to another. In operative effect the power of the householder under the statute is unlimited; he or she may prohibit the mailing of a dry goods catalog because he objects to the contents—or indeed the text of the language touting the merchandise. Congress provided this sweeping power not only to protect privacy but to avoid possible constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a governmental official.

In effect, Congress has erected a wall—or more accurately permits a citizen to erect a wall—that no advertiser may penetrate without his acquiescence. The continuing operative effect of a mailing ban once imposed presents no constitutional obstacles; the citizen cannot be put to the burden of determining on repeated occasions whether the offending mailer has altered his

material so as to make it acceptable. Nor should the householder be at risk that offensive material come into the hands of his children before it can be stopped.

We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even "good" ideas on an unwilling recipient. That we are often "captives" outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere. See *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451 (1952). The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain.

The statutory scheme at issue accords to the sender an "opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." *Anderson Nat'l Bank* v. *Luckett*, 321 U. S. 233, 246 (1944). It thus comports with the Due Process Clause of the Fifth Amendment. The statutory scheme accomplishes this by providing that the Postmaster General shall issue a prohibitory order to the sender on the request of the complaining addressee. Only if the sender violates the terms of the order is the Postmaster General authorized to serve a complaint on the sender, who is then allowed 15 days to respond. The sender can then secure an administrative hearing.[5] The sender may question whether the initial material mailed to the addressee was an advertisement and whether he sent any subsequent

[5] Although subsection (h) specifically excludes the pre-complaint hearing from the provisions of the Administrative Procedure Act, 5 U. S. C. § 554 *et seq.* (Supp. IV, 1965), the Post Office Department has promulgated regulations setting forth procedures governing the departmental administrative hearings. 39 C. F. R. pt. 916.

mailings. If the Postmaster General thereafter determines that the prohibitory order has been violated, he is authorized to make application in a United States District Court for a compliance order; [6] a second hearing is required if an order is to be entered.

The only administrative action not preceded by a full hearing is the initial issuance of the prohibitory order. Since the sender risks no immediate sanction by failing to comply with that order—it is only a predicate for later steps—it cannot be said that this aspect of the procedure denies due process. It is sufficient that all available defenses, such as proof that no mail was sent, may be presented to a competent tribunal before a contempt finding can be made. See *Nickey* v. *Mississippi*, 292 U. S. 393, 396 (1934).

The appellants also contend that the requirement that the sender remove the addressee's name from all mailing lists in his possession violates the Fifth Amendment because it constitutes a taking without due process of law. The appellants are not prohibited from using, selling, or exchanging their mailing lists; they are simply required to delete the names of the complaining addressees from the lists and cease all mailings to those persons. Appellants next contend that compliance with

[6] The function of the District Court is similar to that of the Postmaster General. It is to determine whether the initial mailing included advertising material and whether there was a mailing by the sender to the addressee more than 30 days after receipt of the order. We reject the suggestions that the section should be read to require the District Judge to make a determination of the addressee's good faith, or to conduct an independent adjudication of the pandering nature of the material. The statute was intended to entrust unreviewable discretion to the addressee to determine whether or not the advertisement was "erotically arousing or sexually provocative." "[T]he sole determination as to whether the literature you receive is objectionable or not is within your discretion and you are not second guessed on that discretion." 113 Cong. Rec. 28660 (1967) (Remarks of Congressman Waldie).

the statute is confiscatory because the costs attending removal of the names are prohibitive. We agree with the conclusion of the District Court that the "burden does not amount to a violation of due process guaranteed by the Fifth Amendment. Particularly when in the context before the Court it is being applied to commercial enterprises." See *California State Auto Ins. Bureau* v. *Maloney*, 341 U. S. 105 (1951).

There is no merit to the appellants' allegations that the statute is unconstitutionally vague. A statute is fatally vague only when it exposes a potential actor to some risk or detriment without giving him fair warning of the nature of the proscribed conduct. *United States* v. *Cardiff*, 344 U. S. 174, 176 (1952). Here the appellants know precisely what they must do on receipt of a prohibitory order. The complainants' names must be removed from the sender's mailing lists and he must refrain from future mailings to the named addressees. The sender is exposed to a contempt sanction only if he continues to mail to a particular addressee after administrative and judicial proceedings. Appellants run no substantial risk of miscalculation.

For the reasons stated, the judgment appealed from is affirmed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 399.—October Term, 1969

Daniel Rowan, dba American Book Service, et al., Appellants, *v.* United States Post Office Department et al.	On Appeal From the United States District Court for the Central District of California.

[May 4, 1970]

Mr. Justice Brennan, with whom Mr. Justice Douglas joins, concurring.

I join the Court's opinion but add a few words. I agree that 39 U. S. C. § 4009 is constitutional insofar as it permits an *addressee* to require a mailer to remove *his* name from its mailing lists and to stop all future mailings to the addressee. As the Court notes, however, subsection (g) of § 4009 also allows an addressee to request the Postmaster General to include in any prohibitory order "the names of any of his minor children who have not attained their nineteenth birthday, and who reside with the addressee." In light of the broad interpretation which the Court assigns to § 4009, and see page —, *ante*, the possibility exists that parents could prevent their children, even if they are 18 years old, from receiving political, religious or other materials which the parents find offensive. In my view, a statute so construed and applied is not without constitutional difficulties. Cf. *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503 (1969); *Ginsberg* v. *New York*, 390 U. S. 629 (1968). In this case, however, there is no particularized attack upon the constitutionality of subsection (g), nor, indeed, is there any indication on this record that under § 4009 (g) children in their late teens have been unwillingly deprived

of the opportunity to receive materials. In these circumstances, I understand the Court to leave open the question of the right of older children to receive materials through the mail without governmental interference and also the more specific question whether § 4009 (g) may constitutionally be applied with respect to *all* materials and to *all* children under 19.